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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Yvonne Gonzalez Rogers, Judge

IN RE: SOCIAL MEDIA ADOLESCENT)
ADDICTION/PERSONAL INJURY)
PRODUCTS LIABILITY LITIGATION.)
)
) **NO. 4:22-MD-03047-YGR**
)

Oakland, California
Friday, April 19, 2024

TRANSCRIPT OF PROCEEDINGS

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Friday - April 19, 2024 **9:05 a.m.**

P R O C E E D I N G S

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THE COURT: All right. Good morning, everyone.

THE COURTROOM DEPUTY: Please be seated.

Good morning. Your Honor, calling the civil matter 22-MD-3047-YGR, In Re: Social Media Adolescent Addiction Personal Injury Products Liability Litigation. Appearances will be added at today's minutes for sign-in.

THE COURT: Thank you.

Okay. Let's go ahead and start. So you know what? I forgot a binder. I only brought in four; I needed five. I'll be right back. We're going to start with the bellwether.

Okay. Who is addressing the bellwether issue? Appearances, please.

MS. HAZAM: Good morning, Your Honor. Lexi Hazam for plaintiffs. I will be addressing the personal injury bellwethers. Mr. Weinkowitz will address school district bellwethers.

THE COURT: Okay.

MS. PIERSON: Good morning, Your Honor. Andrea Pierson, Faegre Drinker, for the Tiktok defendants. I'll be addressing the personal injury bellwethers, and my colleague, Geoffrey Drake, will be addressing the school district bellwethers.

THE COURT: Okay. I received the *Lexecon* objections. I think there was an e-mail, something filed last night with respect to potential other issues. So an update first.

MS. HAZAM: Yes, Your Honor. Lexi Hazam.

The e-mails that Your Honor received last night, one was an e-mail from plaintiffs with regards to information that has been designated confidential about the personal injury plaintiffs that is --

THE COURT: I don't intend to use people's names.

MS. HAZAM: Okay. Thank you, Your Honor.

Would you prefer that the parties refer to the plaintiffs in a particular manner, or do you prefer that the parties not address specific bellwether cases?

THE COURT: Well, I don't know that we're going to need specifics. I'm actually interested in knowing what the response is on the *Lexecon* objections. Procedurally what is your response?

MS. PIERSON: Thank you, Your Honor.

And maybe just by way of background I would say this, that the sands have shifted underneath us considerably in the last 48 hours. The Court is aware from our e-mail message last night that one of the bellwether plaintiffs' counsel has informed us of intent to dismiss.

THE COURT: Right.

MS. PIERSON: Two have informed us of their refusal

to waive *Lexecon* to have their cases tried in this case. And in addition to that, five bellwether plaintiffs made material changes to their PFSs regarding age of first use, years of use, first use, and duration of use just overnight. That's eight of 12 bellwethers impacted in just the last 48 hours, including four of six of the defendants' picks.

So, Your Honor, to address specifically, how do we propose to deal with these issues, including the *Lexecon* issues? We would ask the Court for four things, Your Honor:

First, is that further amendments to the parties' bellwether picks should be foreclosed, and the plaintiffs should provide notice to the defendants within seven days of all other cases in which they intend to seek leave to amend their complaints. In addition, if further amendments are sought, the plaintiffs should be required to meet and confer with the defendants to explain both the basis for their amendments, and defendants should have the opportunity to object to any motion for leave to assert further amendments.

The second relief that we request, Your Honor, is that plaintiffs should be required to confirm within seven days that each plaintiff in this MDL wishes to pursue their case and will not dismiss their case if selected as a bellwether.

Third, with respect to *Lexecon*, Your Honor, given that one-third of the defendants' bellwether selections have asserted *Lexecon*, CMO 12 should be modified to require all

plaintiffs to state within seven days whether they intend to assert *Lexecon* objections. Otherwise, there is a significant risk that any replacement selections made by defendants will assert *Lexecon* objections, prolonging and skewing the selection process.

Finally, Your Honor, the Court will recall that PFSs are due for cases in which plaintiffs failed to submit one on May the 15th. Defendants should have at least until May the 15th to select replacement bellwethers for the three cases at issue by virtue of the dismissals and the refusals to waive *Lexecon*, and the personal injury case deadline should be extended commensurate with the time lost due to the repeatedness of the selection process, the need to repeat it.

That's the relief that we would request, Your Honor.

MS. HAZAM: If I may respond, Your Honor?

THE COURT: You're going to be able to respond, but I do agree with the defendants that this has caused significant issues, and some measure of relief will be provided. I'm not -- you know, look, the reality is is that games get played in MDLs. All I've done is advance the game-playing. And what a number of judges in MDLs experience is that this happens at the time of trial. Right? People pull out at the time of trial. That's why I actually like this process. Now, I know now. So I have just advanced a significant amount of games-playing, and we're going to stop it.

So at a minimum, I think it is entirely appropriate to have every single plaintiff decide whether or not they've got a *Lexecon* objection. I won't have the defendants go through and pick people only for them to pull out at the last minute -- and it's not really the last minute -- for them to pull out. And this process, as far as I'm concerned, needs to be redone.

But you can respond.

MS. HAZAM: Thank you, Your Honor.

Respectfully, we are glad that this process is happening now, too. We agree with the sense and efficiency of having these issues arise now rather than later.

I would submit, Your Honor, it's my plea that these are not extraordinary circumstances meriting extraordinary relief. They are fairly typical of MDLs. The plaintiffs moved as soon as --

THE COURT: What do people mean by extraordinary relief, other than everything's going to get pushed at this point to address the fact that we were supposed to have bellwether selection by today in order to meet the aggressive timetable? So I suspect everything's going to get pushed at least, or maybe 30 days is sufficient. But it's going to get pushed because of what just happened.

MS. HAZAM: Understood, Your Honor.

When you say everything will be pushed, plaintiffs would submit that there's not a need as of now to push the remainder

of the entire schedule, including the trial date, because --

THE COURT: I'm not sure of that. We'll see.

MS. HAZAM: Okay. If I may respond to a few of the points that had been made.

With regards to amendments, there are several plaintiffs in the bellwether pool who have sought consent from the defendants to amend their short-form complaints to add additional defendants and some other information. That information is in their PFSs, their plaintiff fact sheets, and that is spurring the request for leave to amend. We do not believe that that is prejudicial to defendants at this early stage of the proceedings.

We are, of course, amenable to defendants picking replacements for these three plaintiffs, one of whom is dismissing with prejudice. So, if anything, that operates to defendants' advantage. That is one fewer case in the litigation. And the other two are exercising their rights under *Lexecon*, which are provided for both under the law and in Your Honor's order.

We informed defendants immediately upon learning that there would be *Lexecon* objections. We sought to learn whether there would be any immediately. The deadline for those objections is not until April 25th, but defendants are already aware of the only ones that there will be as to the personal injury plaintiffs. Defendants have not raised any of their

specific requests for relief that were just enumerated with plaintiffs prior to this hearing. We understand the Court may be inclined to grant some of those.

THE COURT: Well, when were they supposed to do it?

MS. HAZAM: We have been discussing these matters with defendants over the past few days. So we have discussed these issues of *Lexecon* dismissals, et cetera.

Plaintiffs would merely request that Your Honor take into account that we believe that there is more than sufficient time to address replacing bellwethers and to provide information along the lines of what Your Honor is requesting with regards to intent under *Lexecon*. That is a large endeavor because of the number of individual plaintiffs who need to be consulted, but we will undertake it, and we will undertake it as swiftly as we can. We do not believe there is cause presently to extend discovery cutoffs or a trial date.

MS. PIERSON: Your Honor, maybe just one response.

I appreciate your guidance with respect to the *Lexecon* issue in particular, but on this question of amending complaints, I want to be clear that the facts that I recited to you just a moment ago about eight of the 12 bellwethers, those have come to light for us within the last 24 to 36 hours. So these, for us, are late-breaking events. Of course, this is information that's been within the plaintiffs' possession for a much longer period of time. It is impossible to choose

bellwethers with any degree of confidence, when we don't know who the defendants are or the age of first use, peak use, or any of the factors the plaintiffs point to as representative. This information has been within the exclusive possession of the plaintiffs for months now.

So that's why we request, Your Honor, that -- the process that I outlined. That, in fact, the plaintiff should have to give us notice that they intend to seek leave to amend, there should be an opportunity to object, but that once a bellwether is selected, the sands cannot change under our feet.

MS. HAZAM: Your Honor, just one point I'd like to make in response to that.

We are not in exclusive possession of some of this information. The usage of the defendants' platforms by the plaintiffs is, in fact, more in their possession than ours in the sense that they have access to data that we do not have. Some of these plaintiffs do not have an ability to download their data and do not have access to their account history. So their answers to the plaintiff fact sheets on this front, which is what the defendants are referring to, is to the best of their knowledge and recollection.

So we don't actually believe that that is always the case. We have given --

THE COURT: Stop a moment.

(Pause in proceedings.)

THE COURT: Okay. You may proceed.

MS. HAZAM: Simply one other point that I wanted to make, Your Honor, is that one of the *Lexecon* objections that has been raised, has been raised due to a fact that would literally physically prevent a plaintiff from attending trial in California, and that was publicly available information. The plaintiff is on probation, as disclosed in the plaintiff's PFS, and the conditions of probation, which are available on the public docket, would prevent the plaintiff from travel.

THE COURT: I -- that's not necessarily true.

Do you practice criminal law?

MS. HAZAM: I don't.

THE COURT: Do you know how that works?

MS. HAZAM: I only know what I read in the probation order.

THE COURT: All that you have to do is apply to the judge, and we do that all the time, all the time, and we give temporary relief to be -- to locate to a different place for particular purposes.

MS. HAZAM: Understood, Your Honor.

Lexecon does give plaintiffs the right to raise these objections.

THE COURT: It does, correct.

MS. HAZAM: I'm clarifying the basis for it.

THE COURT: It does.

All right. So you need to redo this process, and we need to know which plaintiffs are going to exercise their right, which they're entitled to do, versus not.

How much time do the plaintiffs need?

MS. HAZAM: Do I understand Your Honor correctly that you want that for all plaintiffs?

THE COURT: All plaintiffs.

MS. HAZAM: So, Your Honor, that would total approximately 200 plaintiffs. I -- and we're talking about the personal injury plaintiffs presently, I believe, is that correct, and not the school district plaintiffs?

THE COURT: I'll talk to Mr. Weinkowitz.

MS. HAZAM: Okay. For the personal injury plaintiffs, Your Honor's timeline is probably one that we can meet. We would do our utmost to do so. So I believe Your Honor was contemplating approximately 30 days.

THE COURT: All right. Thirty days takes us to ...

MS. HAZAM: I believe it would be May 17th, Your Honor.

THE COURT: All right. That's 28 days.

So all plaintiffs must exercise their *Lexecon* objections no later than May 17th. Otherwise, they're waived.

MS. HAZAM: Understood, Your Honor.

THE COURT: Now, with respect to where we are now, I take it -- and remind me. I'm looking for your list. Let's

start with plaintiffs. Looking at your list, page 5 of 25, Docket 757-1.

MS. HAZAM: Yes, Your Honor.

THE COURT: Of these six -- and I apologize. Things came in last night, and I've been dealing on a nonstop basis with the Dublin BOP since Monday. So I haven't made notes on my list here, which is why we need to walk through it.

Did anybody of your six assert a *Lexecon* objection?

MS. HAZAM: They did not, Your Honor, and they will not.

THE COURT: Okay. So your six are set and cannot be changed.

MS. HAZAM: Understood, Your Honor.

THE COURT: Going to defendants' list, and I'm at Docket 756-1, Exhibit 1, which is page 28 of 28. Again, I have six. Number 3 has stated a *Lexecon* objection, and which others, using numbers?

MS. HAZAM: Your Honor, number 3 has stated a *Lexecon* objection, number 1 has stated that the case will be dismissed with prejudice. And using the Exhibit 1 chart and numbering just by going down the rows, the final one, number 6, has also raised a *Lexecon* objection.

THE COURT: Okay. Defendants get three more picks.

MS. HAZAM: And, Your Honor, I just want to make sure we're talking about the same case, if I may. The case I

referred to as row 6 on Exhibit 1, it is Row 6 on Exhibit 1, in the e-mail that we sent to Your Honor it was labeled differently. So I just want to read the case number, if I may, to confirm.

THE COURT: I don't have case numbers on Exhibit 1.

MS. HAZAM: Okay. That's correct.

THE COURT: What I can say is that this is the, last name starts with an "M".

MS. HAZAM: Yes, correct.

Thank you, Your Honor.

THE COURT: Okay. So defendants, then, the pool doesn't change. I would expect, and I do expect that you will rank who you want as your next three picks, and you will know on the 17th whether or not they're asserting *Lexecon* objections. So I should have an answer for you on your next three picks by May 22nd.

MS. PIERSON: Thank you, Your Honor.

There was additional relief that we think is appropriate, Your Honor, as I mentioned, with respect to the amendments of the complaints and also amendments to the PFSs.

THE COURT: So I have to look at those on an individual basis. Complaints get amended all the time. The question is whether it's a significant amendment or not. And that's what the discovery process is. You have information that they don't have. They have information that you don't

have.

So certainly it would seem to me that the defendants shouldn't change. That if they are -- there cannot be a change in defendants. You should know whether you're on Snap, or Tiktok or Facebook. If they don't know, that's a problem for you two.

MS. PIERSON: So, Your Honor, our specific request with respect to docket -- and I think it's consistent with what you're saying, is that once a case is chosen as a bellwether, the pick is disclosed by defendants, that there should be no further amendments as to the parties that are involved. So we would ask that the deadline that the Court has given with respect to *Lexecon* waivers, that that should also be our guide as it relates to notice of intent for leave to amend to add defendants, and that once a case is chosen, the parties should not be entitled to change, or plaintiff should not be entitled to add or change the defendants after that point.

THE COURT: I don't think there's a problem with that.

Is there an objection?

MS. HAZAM: Your Honor, there is to a limited extent, and that is that we have a process in place by which we learn from defendants if there are counts that they believe are associated with the plaintiffs. This is part of the plaintiff fact sheet process, and not all plaintiffs had the benefit of

that information prior to their PFSs due to various delays, including on defendants' side of the ledger. And if there is a disclosure of information about an account that plaintiffs were not aware of, keeping in mind that these are often very young people, and we often have a long span of time that may be pertinent.

THE COURT: They currently are not young. They are currently adults.

MS. HAZAM: I'm referring to the larger pool. Approximately 40 percent of the plaintiffs in the larger pool that defendants might be choosing from here are not yet adults. But in today's electronic world, going back 10 years, knowing every account you may have used can sometimes be challenging, which is why that process was implemented. If that process results in accounts that plaintiffs were not previously aware of -- and we have to take the first step as part of this process in identifying the accounts we are aware of. So we do that. Long before they get a PFS, the defendants get that information.

They, then, come back to us with accounts that aren't on the list we did first. That may affect naming of defendants in these cases. I think if there is good cause akin to that, plaintiffs should be able to seek leave of court to amend. Defendants, of course, can exercise their rights to --

MS. PIERSON: Your Honor, our view is that these

cases have been on file for a year or more, in large part, and that the plaintiffs had --

THE COURT: When is the information going to be disclosed to the plaintiffs that you have in your possession? The information she's talking about, when is it disclosed?

MS. PIERSON: They served us with hundreds of requests for production, Your Honor. There's information being disclosed all the time.

MS. HAZAM: Your Honor, those requests for production don't go to individual plaintiffs. I believe the process Your Honor is referring to is going to happen through what I just outlined, as well as the defendant fact sheet, which is being negotiated before Judge Kuhl; I believe will be addressed again this coming week. Once that is in place, we will have more fulsome information about these plaintiffs.

MS. PIERSON: Well, and you recall, Your Honor, we did have this discussion about defendant fact sheets, and when the plaintiffs asked for this incredibly aggressive schedule, they did not include in that some process for defendant fact sheets. We talked about that with Your Honor at the last hearing, I believe, and Your Honor said because the plaintiffs had asked for this aggressive schedule, that the process can't be held up now by some claim that they don't have access to information about their accounts.

The reality is that the plaintiffs can download their own

data, and they've had the ability to do that since the, you know, for as long as their case has been filed, if not before that.

So I just want to be clear, Your Honor, you know, you're building in an additional 30 days into the process, and during that time, the plaintiff should be conducting a census of their cases. They should be talking to their clients about whether they intend to dismiss or not. They should be looking at this information. We should not choose bellwethers, only to have age at first use, peak use change in the PFSs, or the parties themselves change. You know, we spent an incredible amount of time and resources in the two-week period of time between when we received 200 PFSs on April the 1st, to provide our picks on April the 15th, only to have that process completely undone. So respectfully --

THE COURT: Not completely undone. Let's not overstate.

MS. PIERSON: Understood, Your Honor.

THE COURT: I really am not in the mood for hyperbole today. Okay? I got a lot of hyperbole beginning at 7:00 a.m. this morning, so I'm not in the mood for it. Let's stick to the facts.

The reality is that I can't know everything, so the default is is that there shouldn't be a change. If something extraordinary happens or is different, you can bring a motion.

But the bar is very high, and it may -- and it may have ripple effects that you don't appreciate. So I won't bar motions, but the hurdle is high.

MS. HAZAM: Understood, Your Honor.

MS. PIERSON: Thank you, Your Honor.

THE COURT: All right.

MS. PIERSON: Your Honor, I do have some concern about --

THE COURT: Hold on. Because I didn't have realtime, so I didn't have my list of the things you were asking for, which I don't have in writing.

MS. PIERSON: Sure.

THE COURT: Is there something else in your list?

MS. PIERSON: Sure.

We ask that Your Honor, in that process, address the amendments. That within seven days they should notify the defendants of all cases in which they intend to seek leave to amend the complaints, and that they be required to meet and confer to explain the basis of the amendment, and then file a motion for leave with this Court, to which we can object or may choose not to. So as it relates to the amendments, that's the process that we requested.

We also ask that the Court require the plaintiffs, within seven days, to talk to their clients and confirm that they will not dismiss their case if it's selected as a bellwether;

confirm that they want to pursue their case; have that live conversation.

We addressed the *Lexecon* issue.

And then the last issue, Your Honor, was just with respect to the time that defendants have to replace the three bellwethers, and that's the point that I was just about to make. I am concerned, Your Honor, that this pool could change substantially once the plaintiffs review their cases for amendments to PFSs, for amendments to the complaints and also for the *Lexecon* issue. And candidly, I think one week is too tight for defendants to provide three picks, knowing the substantial amount of change that could occur.

Just as I've been talking, yet another of the bellwether plaintiffs that was chosen by defendants has changed key information. The plaintiff fact sheet --

THE COURT: Well, tell me which one and what. Give me a number. So what number? You're left with 2, 4 and 5.

MS. PIERSON: Five.

THE COURT: Okay. What did 5 change?

MS. PIERSON: Information about the dates of usage, which will affect age at first use.

THE COURT: Which is -- so what is that now?

MS. PIERSON: I'm sorry, Your Honor. I don't have that in front of me.

MS. HAZAM: Your Honor, I --

MS. PIERSON: I only know that it's been changed while we are here.

MS. HAZAM: I can address this.

I'd first like to note that the changes that are being made to the PFSs right now are largely in response to deficiency notices received by the defendants, received from the defendants. That is a contemplated part of the process. It is a universal part of a PFS process. It is discovery. Discovery gets amended and supplemented.

THE COURT: Give me the information.

MS. HAZAM: Yes.

And as to this particular case, there was -- we noted, on the basis of a chart we just received from defendants last night, there was an inconsistency that suggested one age in one place and a different age in another place as to the age of first use. So we inquired and learned this morning that one of them was correct and the other was not. These are typical discovery issues that are being resolved by plaintiffs as promptly as possible and now being held against us.

THE COURT: Okay. Still waiting for the answer.

MS. HAZAM: That was the answer, I'm sorry. The answer is that there was an inconsistency --

THE COURT: No.

MS. HAZAM: Sorry.

THE COURT: I'm looking at the chart.

MS. HAZAM: Yes.

THE COURT: Age of first use changes to what?

MS. HAZAM: I believe that the age of first use the defendants had in their chart was nine, and the actual age is 11.

THE COURT: I have here six, so which is it? Six, nine, 11?

MS. HAZAM: I'm sorry. Maybe I'm looking at -- can Your Honor -- you're using defendants' exhibit at the end?

THE COURT: I'm looking at their chart, page 28 of 28.

MS. HAZAM: And you're using number 5? I just want to clarify so I can answer.

THE COURT: B, as in boy, H, as in hat.

MS. HAZAM: I do have someone here who could answer that question if you'd --

MS. PIERSON: Your Honor, I believe my colleague, Mr. Halperin can answer that.

THE COURT: All right. Mr. Halperin?

MR. HALPERIN: Good morning, Your Honor.

The changes that we received with regard to this plaintiff, based on a very quick review of the fact sheet that literally came in during this hearing --

THE COURT: Don't -- again, don't repeat. We have a lot to do today.

MR. HALPERIN: Sorry, Judge.

THE COURT: So I don't want to hear any repetition, and I don't want to hear any hyperbole.

MR. HALPERIN: Yes, Your Honor.

The changes that we have found are that the time, the number of minutes per night for two accounts have been cut in half.

THE COURT: Okay. So --

MR. HALPERIN: The age --

THE COURT: -- that's not a basis upon which you argued anything in this motion.

MR. HALPERIN: That's correct, Your Honor.

THE COURT: Okay. So that's not relevant to me.

MR. HALPERIN: Okay. The time used has changed. The average daily use was changed on one platform was changed from 720 minutes, down to 200 minutes. On another platform from 720 minutes, down to a hundred.

THE COURT: Are you talking about the daily uses? Because that's the metric that you gave me.

MR. HALPERIN: Yes, Your Honor. I can tabulate it, if you give me one second just to do some math on the fly.

THE COURT: And you already knew that there was some kind of inaccuracy, because your chart indicates that the PFS alleged more than 24 hours per day, which is not -- which can't be done.

MR. HALPERIN: Right, Your Honor.

THE COURT: So you knew there was a problem with this to begin with when you chose it.

But go ahead. What is the average daily use now?

MR. HALPERIN: It is now 6.8 hours.

THE COURT: All right. 6.8 versus 10-plus, I'm not sure how much that matters.

MS. HAZAM: Your Honor, with respect, that was why we changed this this morning. This client is represented by my firm, and we noted that the minutes had an issue in our calculations, again, based on defendants' chart and brief, and we rushed to address it. We regret the error, but again, this is a typical part of the discovery process, and defendants are issuing multiple lengthy --

THE COURT: I -- again, use words sparingly.

MR. HALPERIN: Your Honor, there was one other change, as well, to the injury alleged.

THE COURT: All right.

MR. HALPERIN: Laxative use was added as an injury, overexercise was added as an injury, and orthostatic dizziness was added as an injury.

THE COURT: Okay. Again, that doesn't make a huge -- it's not a huge difference.

MR. HALPERIN: Understood, Your Honor.

THE COURT: In fact, what it is, is it gives you more

specifics with respect to some of this other stuff. So to the extent that's an objection, it's overruled.

There is no perfect picks. When I reviewed your arguments and looked at the data that had been provided to justify your arguments, you each only get six picks. And there are lots of different metrics. So you're cutting them and slicing them in slightly different ways. That's why I said just a moment ago that, you know, the objection that there is a change frankly didn't really seem to matter, given the kinds of choices that you're making and the arguments that you're making for those choices.

So what I did is I looked at the metrics that you provided me. I tried to compare apples to apples. Sometimes I only had apples and oranges. But age was clearly a factor, age of first use, gender, geography. For purposes of bellwethers, I think that that matters, the type of injury, and obviously the defendant.

I think both sides skewed, perhaps in a way that benefits them, each side. But as a totality, because you both skewed for your own benefit, a group that I thought was basically representative. You did the same thing with the school districts. You both skewed, but collectively there's balance.

So I disagree that you can't, given the factors that you argued, I disagree that you can't make those choices, because there is -- we don't have perfection here. And the factors

that are the big-issue factors that I just went through are easily discernible, and I think -- and those are the ones that I'm looking at to see if I have balance in terms of bellwethers.

There were no cases, though, from the northwest. Why is that?

MS. HAZAM: Your Honor, if I may, I can take a stab at answering that.

To the extent that California can be considered partially northwest, there are very few California plaintiffs in the MDL because of a lack of diversity. I frankly don't have numbers in front of me on the other northwest states, but I know that they were not among the states that had the largest number of plaintiffs, which were Illinois, both sides picked an Illinois case; New York, we picked a New York case; Georgia, we picked a New York (sic) case, and a few others. I don't believe that the -- that Oregon and Washington ranked highly, but we can get you that information certainly if it's a concern of the Court.

MS. PIERSON: We did look at that information, as well, Your Honor. And I agree, there were very few plaintiffs from the west and northwest in this pool.

MS. HAZAM: We do have a plaintiff from Arizona, and that represents the western states among our picks. The defendants did not have any picks west of Illinois.

MS. PIERSON: Although there is one from Colorado,

right?

THE COURT: No.

MS. HAZAM: No.

THE COURT: You had two from Pennsylvania --

MS. PIERSON: Okay.

THE COURT: -- one from Alabama, one from Virginia, one from Kentucky and one from Illinois.

MS. PIERSON: That's correct, Your Honor. I'm sorry, I was looking at my chart of all the picks.

THE COURT: I think geography matters. Having grown up in Texas, having gone to school on the East Coast, and having lived as an adult in California, very different. Each of those areas is different, and how people interact and operate is different. And so, for me, making sure that we have geographic diversity is quite important.

Now, kids can be kids. That's why age matters and use matters. Again, I think the reference gender, I think it is entirely appropriate to have a male pick. The plaintiffs chose not to do that. But like I said, you picked more men than females, so you skewed. But collectively, because they picked none, that gave balance. That's an example of each of you skewing, with the ultimate results being balance. So those are some of the statistics that I'm looking at.

All right.

MS. PIERSON: Your Honor, may I make one request in

following up on the factors that you just identified?

We looked at those factors, as well. We highlighted them. They're in our brief. Those are important, I think, to both sides. And our concern with respect to the changes in the PFSs, while we agree those are changes that are made in response to deficiency letters, we've now sent out deficiency letters in all the cases where we have PFSs to date. But we need to know what those factors are, too, to be able to choose, to bring to you cases that are representative, we need to know for sure what is the age at first use.

You know, information --

(Simultaneous crosstalk.)

THE COURT: So, again, the difference between a six-year-old and a seven-year-old is minor. The difference between a six- and seven-year-old and an 11- and 12-year-old is significantly different. So one year isn't going to change the analysis, and maybe not even two years.

When I looked at this, I am looking at buckets. So, you know, like I said, it's not necessarily going to be perfect. Clearly, significant changes are a problem, or could be a problem. And perhaps the way I deal with that if that happens is that you get another pick. This is a -- this is an organic process.

MS. PIERSON: Understood.

I think my only ask there, Your Honor, that was in this

30-day period of time that you've given the plaintiffs to review their cases for *Lexecon*, it seems appropriate that during that period of time they should also review for these key things that you've identified today.

THE COURT: I agree. I agree.

And the -- you know, the incentive to do that is not to extend the schedule, is not to give them an extra pick that you don't want -- that you will not -- I will not reciprocate.

So it's in your interest to make sure that the information is as complete as possible if we're gonna keep on this schedule.

MS. HAZAM: Understood, Your Honor. We agree that we have every incentive to provide as fulsome and accurate of information as possible.

I will note that of the things Your Honor mentioned, the plaintiff geographic location is not going to change. The plaintiff's current age is not going to change. The issue is age of first use, as I understand it. We do our best on that front, and will continue to do so. The -- again, our responses to defendants' questions, some of which we don't believe are even deficiencies, but putting that aside, our responses are designed to be responsive, and it seems that that process is now sort of being weaponized against plaintiffs.

But I will say that particularly with age of first use, I believe that generally defendants have that information in a

more reliable and precise form than we do. That doesn't mean we aren't endeavoring to provide it. It doesn't mean we aren't doing download your data when we're able, which is not always, because sometimes plaintiffs can't access their accounts.

But most of the information Your Honor has listed is not something that will change.

THE COURT: Okay. Then I won't have any extra motions.

All right. Let's talk about the school districts.

MS. HAZAM: Thank you, Your Honor.

THE COURT: And for the record.

MR. WEINKOWITZ: Good morning, Your Honor. Mike Weinkowitz on behalf of the plaintiffs.

MS. YEATES: Good morning, Your Honor. Melissa Yeates on behalf of the school district plaintiffs.

MR. DRAKE: Good morning. Geoffrey Drake, King & Spalding, for the Tiktok defendants.

THE COURT: Okay. This was an interesting review. Again, I think that both sides skewed to some extent.

The metrics that you gave me and that I was looking at include geography, suburban. Population size, the -- and that is the population size of the school district. One of you used income level, the other used percentage of free meals. So not quite apple-to-apple kind of comparison.

Ultimately -- well, and I think the defendants gave me

another metric which I found to be useful, which was, we're looking at 20 percent of the districts as being in what I would call kind of the small range, so 1750 or less in terms of school district size; 20 percent being over 30,000, and then 60 percent somewhere in the middle.

So as I looked at all of these different groups, I ended up having one that was what I would call like a mega school, 225,000, which is, you know, perhaps is a useful data point. That is, like having one person who suffered a suicide might be a useful data point, having something that's mega like that; two that were large, five that were small, and four that were somewhat medium, given those various metrics. And then obviously, as I've mentioned before, the geographic locations.

Again, you know, defendants had -- well, you each had one in Maryland, you each had one in New Jersey, you each had one in South Carolina, and then Georgia was included, Florida, and a second South Carolina school. Well, and then we had Utah.

So I think, in balance, given your collective choices, I am comfortable.

All right. Are there issues with this group?

MR. WEINKOWITZ: Your Honor, we have canvassed all of the plaintiffs' school districts since we've got the defense picks. None of the plaintiffs' -- all of the plaintiffs' picks will waive ***Lexecon***. The defendants, we have talked to every school district of the defendants' picks, and we have two that

have not indicated yet that whether they will object or whether they will not, but the rest have.

So there are two outliers --

THE COURT: Four are objecting, or four are waiving?

MR. WEINKOWITZ: Four are waiving. Everyone is waiving, except for two that I haven't heard back from.

THE COURT: Okay. And which are the two?

MR. WEINKOWITZ: The two are Baltimore city and Dekalb, and the prob --

THE COURT: Baltimore city and -- I only have the states.

MR. WEINKOWITZ: Dekalb, Georgia, Your Honor.

And, you know, the process is a little bit different for a school district. You have to reach out to the solicitor. You have to have the board consider it. And we'll have answers by the 25th, and the moment I have an answer, I'll let the defendants know.

THE COURT: Okay. So both of those are what I put in the large category.

MR. DRAKE: That's right, Your Honor. Those were our two efforts to select relatively large districts to be representative of the whole.

THE COURT: Okay. So that we get ahead of this, what I would ask is that you have a short list. Pick whatever number you want; six, eight, 10. Send that list to plaintiffs'

counsel. And I ask that, I want to know within a week whether that list that you are giving them, whether there's a *Lexecon* issue. So they have to waive whatever that list is. Waive --

MR. WEINKOWITZ: Yes, Your Honor.

THE COURT: -- or they have to -- or we need to know. And that way you have that information in advance in the event that your two first picks do not waive.

MR. DRAKE: Okay. That's fine, Your Honor.

It might take us a little bit of time to identify or come to agreement on that next group of six to 10. Maybe, maybe we could do it in a week or so, or 10 days. Again, the *Lexecon* waiver is after that -- is before that deadline I just gave, I suppose, but ...

THE COURT: As long as you're on track with the individual plaintiffs, I'm fine. So I will ask that the two of you meet and confer and agree on a process and on dates, and you only come to me if you have an issue.

MR. DRAKE: Yes, Your Honor.

Just one question, Your Honor. As to the districts that Mr. Weinkowitz has already indicated are not waiving *Lexecon*, and as to the plaintiffs' selections, I assume that discovery is --

THE COURT: Well, as I heard it, everybody has waived except for two who are uncertain.

MR. DRAKE: Correct.

And as to those entities and as to the plaintiffs' six entities, I would just like to confirm that discovery is open and can commence and we can get rolling.

THE COURT: Absolutely.

MR. DRAKE: Okay.

MR. WEINKOWITZ: Yes, Your Honor. That's fine.

THE COURT: Okay. Any other issues with respect to this group?

MR. WEINKOWITZ: No, not on our end, Your Honor.

THE COURT: Okay.

MR. DRAKE: Not on our end. Thank you.

THE COURT: Okay. Thank you.

MS. PIERSON: Just one clarifying question. Is it your intent to take up the schedule for the personal injury cases after we get through this process in May?

THE COURT: I'll look at what we have right now.

So right now, the close of fact discovery is December 20th. With respect to all plaintiffs who have waived *Lexecon*, discovery is open. So I'll figure out at the next one, or it may even be June or July, whether I need to extend it for those specific individuals who were chosen late, but I'm not going to do it right now.

MS. PIERSON: Understood. Thank you.

THE COURT: Okay. Thank you.

MR. WEINKOWITZ: Your Honor, I apologize. There was

one other issue I wanted to raise with regard to the school districts.

THE COURT: Okay. Mr. Weinkowitz.

MR. WEINKOWITZ: There are two states in this school district pool, Utah and Arizona, that have not been -- that are not the subject of the motion to dismiss that's currently pending and will be heard before Your Honor at the next status conference. Our proposal is is that we do briefing before the next status conference and the argument, and I think that we could probably do that very quickly with a limited number of pages. And my proposal is is that we can even do that briefing simultaneously and submit to the Court so we're ready to argue at -- in May.

THE COURT: And I need a name, please.

MS. HARDIN: Ashley Hardin from Williams & Connolly on behalf of the YouTube defendants, Your Honor.

THE COURT: Okay. Response?

MS. HARDIN: Mr. Weinkowitz just approached us about doing that a few minutes before the hearing, so we haven't had a lot of time to look at it, but it does seem to us based on our quick research that both Utah and Arizona follow the Restatement. I have some inkling that Mr. Weinkowitz might disagree with that, but the briefing that we've already done would largely cover that. Of course, if Your Honor would like to receive individualized briefing on those two states, we're

happy to provide it.

MR. WEINKOWITZ: And, Your Honor, we're happy to forego it. We'll forego the briefing. We've briefed these issues ad nauseam with the current briefing, and we think that Arizona and Utah fit right in, and unless there's a specific issue that you would like us, or question you would like us to answer, I think we can proceed.

THE COURT: What I need is if you all are -- if you agree that the Restatement applies, and so the briefing with respect to that applies, then what I'd like is a joint stipulation that says, we agree, and the parties will be bound by the Court's decision with respect to those with respect to these two states. That's -- that would be the most efficient for me.

MR. WEINKOWITZ: Yes, Your Honor.

Could we meet and confer and get that in to you in a couple of days?

THE COURT: Absolutely.

MR. WEINKOWITZ: Great.

THE COURT: Okay.

MS. HARDIN: Thank you, Your Honor.

THE COURT: Thank you.

Okay. Anything else you want to discuss with respect to where we are on the bellwether process? No?

UNIDENTIFIED SPEAKER: No, Your Honor.

THE COURT: Okay. Let's move to the motions, then.

Okay. With respect to the motions, have you all divided up the arguments so that I know -- I can tell you the manner in which I will hear argument.

First, we will -- first, I'll address the COPPA violations. Who's arguing that?

MR. SCHMIDT: Paul Schmidt for Meta, Your Honor. I'll be arguing that for Meta.

MS. MIYATA: Your Honor, Bianca Miyata from Colorado for the state attorneys general and my colleague, Daniel Edelstein from Illinois will be arguing that issue.

THE COURT: Okay. And then after that, Section 230?

MR. SCHMIDT: That will be me again on the defense side. Paul Schmidt for Meta.

THE COURT: All right. Are you doing the entire thing?

MR. SCHMIDT: No, thank goodness. That's the end of me.

THE COURT: Okay. And on plaintiff's side?

MS. MIYATA: That will be me for the state AGs, Your Honor.

THE COURT: Okay.

MR. PANEK: Good morning. Gabriel Panek for personal injury plaintiffs. I'll be handling Section 230 with respect to Count 7 in our master complaint.

THE COURT: Okay. With respect to that, the -- well, all right. I'm sorry. Your name again?

MR. PANEK: Gabriel Panek from Lieff Cabraser.

THE COURT: Okay. The next issue after that are the unfair and unconscionable practices, various acts. Who will be doing that argument?

MR. SCHMIDT: That would be my colleague, Mr. Hester, also from Meta. Tim Hester.

THE COURT: Okay.

MS. MIYATA: That will be Lauren Bidra, from Connecticut.

MR. SCHMIDT: And also Mr. Blavin.

THE COURT: Hold on. Hold on.

Bidra, B-i-d-r-a?

MS. MIYATA: Correct, Your Honor.

THE COURT: Okay. And you said also?

MR. SCHMIDT: Mr. Jonathan Blavin will address that issue on the personal injury side in terms of non-Meta claims. He represents Snap.

MR. PANEK: And I'll be addressing that, Your Honor. Gabriel Panek from Lieff Cabraser.

THE COURT: Okay. Then we'll move to deceptive acts and practices.

MR. SCHMIDT: That will be Ms. Simonsen. Ashley Simonsen, for Meta on the defense.

MS. MIYATA: And that will be Megan O'Neal from California, for the state AGs.

THE COURT: Okay.

MR. PANEK: Your Honor, to the extent that that argument includes whether the threshold requirements of the UDAP statutes apply to personal injury plaintiffs, to the extent Ms. Simonsen raises that, that will once again be Gabriel Panek, myself.

THE COURT: With respect to Section 5 of the FTCA, is that going to be addressed separately, and are people interested in addressing the state-by-state issues?

MR. HESTER: Your Honor, Timothy Hester, Covington & Burling on behalf of Meta. I had been planning to walk through state by state on the various issues, including the FTC Section 5 standards and the related issues raised by different state laws. I had been planning to work through state by state.

THE COURT: Okay.

MS. MIYATA: And, Your Honor, Lauren Bidra is prepared to do that should the Court find it necessary.

THE COURT: Okay. There are all sorts of other issues related to that, including the trade in commerce requirements. Is that going to be part of the presentation, Mr. Hester?

MR. HESTER: Yes, Your Honor. I had been planning to

address all of those individual state issues as part of my presentation.

THE COURT: Okay. And restitution, as well?

MR. HESTER: Ms. Simonsen was going to address restitution as a separate issue, if that's okay by the Court.

MR. SCHMIDT: But not to jump in, we'd also be good standing on the papers on that issue. It's a more discrete issue. As the Court wishes.

THE COURT: Okay.

MS. MIYATA: And, Your Honor, we do have an additional colleague who's prepared to speak to trade and commerce. That would be Anna Smith from South Carolina. And to the extent the Court requires argument on restitution, I will be addressing that for the state AGs.

MR. PANEK: And once again, Your Honor, Gabriel Panek for personal injury plaintiffs. To the extent that that is where in the argument defendants raise whether that requirement applies to the personal injury plaintiffs' claims, I will be addressing that.

THE COURT: Okay. Mr. Hester, are you going to discuss reliance and ascertainable loss as part of your presentation?

MR. HESTER: Your Honor, I had been planning to address ascertainable loss as part of my presentations, and I had been envisioning that Ms. Simonsen would address reliance

as part of the basic misrepresentation issues that she would be covering.

THE COURT: Ms. Miyata?

MS. MIYATA: Your Honor, I believe reliance will be discussed by Ms. O'Neill from California.

THE COURT: And ascertainable loss?

MS. MIYATA: Ascertainable loss, again, to the extent that that's necessary for restitution, I will address that.

THE COURT: Okay. And I don't really have any questions, but just making sure I understand the flow here.

MR. PANEK: And, Your Honor, when those elements come up, it sounds like it's not entirely clear, but whenever they are necessary to be addressed for the personal injury plaintiffs' claims, myself, Gabriel Panek, I will be addressing those. And Mr. Warren from Motley Rice is prepared to address any arguments regarding counts 8 and 9 and the motion to dismiss as to those claims.

THE COURT: Okay. Personal jurisdiction with-- and pendent jurisdiction with respect to the Middle District of Florida?

MR. HESTER: Your Honor, Timothy Hester. I had been planning to address that issue.

MS. MIYATA: And for the state attorneys general, Donna Valin, from Florida, will address that issue.

THE COURT: And the motion to remand?

MR. SCHMIDT: That would be Isaac Chaput, Your Honor, from Meta, also for Covington.

MR. CHIN: Edward Chin from Bruster, PLC on behalf of the Younger plaintiffs.

THE COURT: You have to be in front of a microphone.

MR. CHIN: Excuse me. I'm sorry. Edward Chin of Bruster PLC on behalf of the Younger plaintiffs on that remand motion.

THE COURT: Okay. All right. As you can see, we have a lot to do. We'll probably take one break during this process.

Let's go ahead and get started with COPPA.

MR. SCHMIDT: Yes, Your Honor. Paul Schmidt again for Meta. May I proceed?

THE COURT: You may.

MR. SCHMIDT: Thank you.

On our COPPA argument, I want to be clear just at the outset what we're arguing what we're not arguing. We heard what Your Honor said about the 230 briefing and the breadth of the 230 briefing. We have tried to be responsive by being very targeted here. We will, at some future point, challenge their COPPA claim based on alleged actual knowledge. We're not doing that for a motion to dismiss.

Instead, our motion to dismiss focuses on the distinct COPPA claim that they -- that the services at issue, Facebook

and Instagram, are directed to children. That's a distinct legal question where the Court's guidance will shape how the parties litigate and ultimately resolve this case, and it's one that's uniquely presented here in terms of the states having an opportunity to conduct an investigation and make use of that investigation in their complaint on that issue.

THE COURT: Well, and that's -- I want to talk about that first, which is typically in a 12(b)(6) context.

If a party has a viable theory upon which to proceed, the motion's denied. The motion's denied, because the Federal Rules of Civil Procedure do not, do not contemplate use of that procedural mechanism to eliminate a theory. That's summary judgment. There's different mechanisms. Sometimes courts will eliminate a theory for a particular purpose for efficiency's sake.

So in many ways you just conceded that if I deny your motion, because you've conceded -- or not conceded, but you're not challenging a viable theory of relief. So the COPPA claim will proceed, period, despite your motion.

So given everything that we have, why should I do that? What is the point of eliminating a theory at this point in time?

MR. SCHMIDT: I think there's two things I would say in response to that, Your Honor.

One is although they have a single COPPA count in their

complaint, they have pled it as two separate claims in terms of, in the words of their opposition, two independent grounds. In terms of the way they set up their complaints, where they have one section, 642 to 745 paragraphs that addresses actual knowledge, a different section that addresses whether the services are child directed, paragraphs 746 to 805.

We don't think it's proper to mesh those in one claim, when they're distinct claims, to try to avoid early Rule 12(b)(6) guidance, especially on a critical issue like this. As Your Honor referenced, even if they were treated as just one claim and not independent, as they've been pled in terms of the factual basis for their claims, there is real benefit in an MDL setting like this in doing with COPPA what Your Honor did and what we appreciated Your Honor doing with Section 230, identifying for the parties what remains and what doesn't. Because as to COPPA, that will dramatically shape how the parties work up the case, how the parties ask questions at depositions, what they focus on, what the expert case focuses on, all of which we would otherwise not have the Court's guidance on until, as Your Honor flagged, potentially summary judgment.

It's -- in a litigation this complicated, where they have had the benefit of doing their investigation and know what they want to say, to a large extent from that investigation, and have said it in separately pled sets of factual allegations, it

would give really meaningful guidence to progress the litigation and ultimately progress it towards resolution.

So that would be -- that would be the response on the procedural point.

In terms of the substance point, there's no -- and I think this also goes to the procedural point in terms of this being such a threshold legal issue for the Court that really will shape this litigation.

There is no case where what the states are trying to do here has been done before. There's no case law they can cite blessing their theory of what it means to be directed to children. And, in fact, it's contrary to the statute and the statutory scheme, as I'll address, but it's also contrary to 25 years of guidance from the regulator, the FTC, that's charged with both rule-making under COPPA and enforcing COPPA. And those are the two points I'll touch on, the statutory scheme and the FTC guidance that we think is notable here.

In terms of the statute itself, Congress could have written COPPA to have very broad application to require what the states seem to be seeking through their lawsuit, and it didn't. It didn't require things like age verification, age checks, things like that, that they reference in their lawsuit. Instead, what it did was operate in a very targeted way in two very targeted, distinct circumstances, both of which are focused on what the operator, which is the term the statute

uses, does in terms of how it sets up its service, or knows in terms of actual knowledge.

So one basis is the actual knowledge basis, actual knowledge that a service is collecting information from a child under 13. That's meaningful. Not notice, not constructive knowledge. Actual knowledge.

And then, two, the issue that we're here for, did the operator set up the service so that the service as a whole, or some portion of it would be directed at children. Again, focused on the acts of the operator and the choices that the operator has made. There is a statutory definition for what it means to be directed to children. That statutory definition says there has to be the whole service being targeted to children, or in the words of the statute, some portion of the service being targeted to children.

In terms of the whole service, there's no serious argument that Facebook and Instagram are general audience sites, the opposite of a child-directed site. They're so plainly general audience sites, that when the FTC last amended its regulation on COPPA, it used Facebook as a paradigm example of a general audience site. And that's supported by the pleadings of the states' complaints, which describe the sites as generally appealing in terms of the audience they're reaching.

The description in the complaint of Instagram is: "A mobile application that allows users to share content, such as

photographs and videos, online and over social networks." That's paragraph 35. And that's the meaning of -- that's the epitome of a general audience site.

The other way they could go is to claim that there is a dedicated portion.

THE COURT: I'll need to interrupt you for just a moment.

We're going to take a five-minute break.

MR. SCHMIDT: Of course, Your Honor.

(A recess was taken from 10:21 a.m. to 10:28 a.m.)

THE COURT: All right. Are you ready?

All right. We're back on the record. The record will reflect that the parties are present.

Mr. Schmidt.

MR. SCHMIDT: Yes, Your Honor. Thank you for letting me continue.

Just to pick up where I was, I was talking about the statutory structure. The statutory structure recognizes two distinct claims. Full knowledge --

THE COURT: Right.

MR. SCHMIDT: -- directed to children. And that's how they've pled their claims outside of the actual statement, a cause of action. At page 14 -- 107, starting at page 642, they plead an actual knowledge claim as --

THE COURT: I don't think there's any dispute any

about that, right?

MR. SCHMIDT: Okay. And they do the same --

THE COURT: You agree there's no dispute about that. You have two theories. You've pled two theories.

MR. EDELSTEIN: Yes, that's true.

THE COURT: Okay. Let me ask you this. What kind of deference is owed to the FTC, especially in light of the current Supreme Court? And this will be a fun discussion, given that we don't really know.

Go ahead.

MR. SCHMIDT: I think it's a really good question, because it is a live issue, as Your Honor noted, before the Supreme Court.

What's a little different here on the deference question is I don't think there's been any invocation of FTC standards by another party. There might be in the future, but here, I don't think there's been any invocation of FTC standards by another party that the other side is challenging.

THE COURT: But there are three different things going on, right? We've got the FTC's definition --

MR. SCHMIDT: Yes.

THE COURT: -- of "directed to children." We have the FTC's COPPA FAQs, which is different, right? It's a different document.

MR. SCHMIDT: Yes.

THE COURT: And certainly when we do administrative law review, the source of the agency's guide sense a consideration.

MR. SCHMIDT: Yes.

THE COURT: And then, finally, you know, there is the requirements in terms of the manner of collecting personal information from a child, which is also a different format.

Should there be a -- is there a difference in the Court's evaluation of those different sources of guidance from the FTC?

MR. SCHMIDT: Well, I think, yeah, there probably is, in that -- first of all, just to add to the list, we have the statute.

THE COURT: Right.

MR. SCHMIDT: Obviously the statute trumps, and anything contrary is superseded by the statute. I don't think anyone has relied on anything contra here. That might happen down the road.

In terms of the FTC itself, it did go through the rule-making process, and to the extent there were deference, there would be greatest deference among the FTC statements to the rule.

In the context of the rule-making, it did make Federal Register statements in the context of both the original rule and an amended rule and then a regulatory review directed by Congress. Those probably don't get the same deference as the

rule, but there's no dispute --

Sorry, should I stop, Your Honor?

THE COURTROOM DEPUTY: Sorry, Your Honor. The court reporter requests that we identify ourselves before speaking.

MR. SCHMIDT: I apologize. This is Paul Schmidt again for Meta.

MR. EDELSTEIN: I don't believe I had introduced myself personally. My name is Daniel Edelstein. I'm from the Office of the Illinois Attorney General on behalf of the Attorney Generals in this matter.

THE COURT: Thank you.

MR. SCHMIDT: And then I think the FAQ would get the least deference. But again, I don't think there's a dispute as to the parts that have been invoked as to how they apply here. That might happen down the road, including on actual knowledge when we come to litigate that issue.

THE COURT: But would you agree, or what's your perspective on that topic?

MR. EDELSTEIN: I don't think that it's -- at this point I don't think that it's relevant for us the amount of deference given, that the complaint plausibly alleges that the directed-to-children factors have been met on the face of the complaint.

And in addition, the specific cite to the FTC's footnote in the statement of purpose from 2013, I think that we can also

distinguish that on the facts of this case. Namely, that -- well, on the one hand, that a general audience website can still be subject to COPPA and directed to children if portions of the website are directed to children. That's from the language in the rule itself. And although we would dispute that Facebook or Instagram are general audience, we have plausibly alleged that portions of both are directed to children.

In addition, the FTC may have said in 2013 that Facebook, and in that same footnote YouTube, in 2013 were general audience, two issues are present with that. One is that it's been over 10 years since then. Things have changed. The Internet has changed. There's no indication from that footnote that the FTC had evidence of the -- of clearly establishing the directed-to-children factors that the state AGs have pled in this complaint. And number two, in 2019, the FTC and the New York Attorney General took action against YouTube and ultimately settled that case, finding that although YouTube may have been a general audience website, it had portions that were directed to children. And in that footnote, it says Facebook and YouTube are general audience.

So clearly it's -- whatever standard deference is applied, it's clear from the FTC enforcement policy, and the state AGs for that matter, that general audience websites with child-directed portions are subject to COPPA.

THE COURT: Your response?

MR. SCHMIDT: Yeah. That goes to the heart of the issue, which is, is -- can a portion of these websites be treated, as the services be treated as child directed.

Just briefly in terms of the subsequent FTC record that counsel referenced, there has of course been no such action with regard to either Facebook or Instagram. With regard to YouTube, as counsel noted and we note in our reply brief at page 3, the FTC did acknowledge that YouTube is a general audience user-generated video-sharing platform, despite the presence of some child-directed content. What the difference was with YouTube, and it goes to this meaning of what it means to have a portion of the service directed --

THE COURT: Is it Meta's position that individual third-party content account pages cannot constitute a portion of a website?

MR. SCHMIDT: That is our position, Your Honor. And it's supported in the structure of the statute and in the history on the statute. In terms of the structure of the statute, it focuses on what the operator is doing, how the operator set up the website, but --

THE COURT: So it has to be, for a portion in your view to exist, it must be created by the service itself?

MR. SCHMIDT: Yes. There must be something dedicated to children. That --

THE COURT: And your -- the source of your -- what you really ground yourself in is the statutory language?

MR. SCHMIDT: It's the statutory language, but it's also a couple of extra sources that we cite in Footnote 6 of our reply brief in response to how the states argued this. It's the congressional record, the legislative history, where, in enacting COPPA, the legislative history referred to a portion indicating that there is a, quote, special area for children. The COPPA regulation tracks that. It also refers to a separate children's area. And then the FTC guidance from its last amendment to the COPPA rule made the same point. There must be a, quote, distinct children's portion or area.

And they don't -- they don't plead any of that. That's not their pleading is that there's a separate children's area. In fact, when they make allegations about that, what they allege is that Meta was looking at creating entirely separate services, like Instagram Kids, that would fill that portion role. Instead, I think Your Honor hit the nail right on the head. What they're saying is if they can find in quantum of accounts and pages -- that's the verbiage they use in their opposition brief -- then that takes these entire services, or some ill-defined portion of them, I guess the accounts and services they identify, and make those child directed. And that's contrary, we think, to the statutory structure and also contrary --

THE COURT: What about -- what about the sheer size of a service? That is, a portion for Meta is substantially bigger --

MR. SCHMIDT: Yes.

THE COURT: -- than perhaps something that, you know, some smaller independent group that, you know, doesn't have the -- that doesn't have the level of acceptance. Does that change the analysis at all?

MR. SCHMIDT: I think it changes it in the direction that we're arguing, that this attempt to have a COPPA claim by saying, if, on a massive service we can find a certain number of sites or third-party content, then we can say, well, maybe that has appeal to children, even though it has general audience appeal, as well, that converts the whole cite, or that converts some discernible portion of it into a child-directed site. That's why we say in our brief their arguments would have sweeping consequences, because that argument could be made for any service that gets sufficiently large. And their examples illustrate that, and I'll just touch on a couple.

Some of their examples are plainly meritless. They say in paragraph 760 of the complaint that there's an Instagram ad that appears to involve, quote, actors who appear to be children or teens, and then they include a screenshot of it. It's very clearly a teen, and the ad itself says that. It has a banner on the ad that says this is for teens and parents in

terms of providing tools for parents and teens to work together to create positive experiences. It's notable that after their investigation, one of their hallmark examples of something that purportedly makes Instagram child directed is something that is not child directed that, on its express terms, is for teens.

Their are other examples, though, make clear that they're doing exactly what Your Honor said. They're trying to say, if we can find some example of third-party content, that on a general audience site that might have general audience appeal but that also might appeal to children, that fundamentally converts the nature of the service. They talked about --

THE COURT: Let me get a response.

MR. EDELSTEIN: Thank you, Your Honor. There are a number of things to address in that.

First, I just wanted to go back and agree with your initial opening point and line of questioning, that we -- that we agree fully that this -- that motion -- or 12(b)(6) motion is improper to dismiss parts of claims.

THE COURT: Yeah, I understand that argument. I don't know if I -- what I'm going to do, but I don't need argument on it.

MR. EDELSTEIN: Okay. Understood.

THE COURT: Unless you -- as I said, the reason to do it is if it somehow shapes the litigation. So is your discovery strategy going to be the same or different if I take

out that one theory?

MR. EDELSTEIN: We do think that there would be some differences at trial in terms of the discussion and evidence presented in terms of what goes to prove actual knowledge and directed to children, but ultimately the inquiry is directed towards Meta's failure to comply with COPPA by failing to provide notice and consent to parents and risking the safety of children and privacy of children online.

MR. SCHMIDT: May I say one thing on that, Your Honor?

THE COURT: Well, I think the question is: If you don't concede that the directed to children isn't an avenue, I would expect that you are going to do discovery on whether you can prove liability under a directed-to-children theory.

MR. EDELSTEIN: The -- it would -- the discovery would help us to show -- to form the basis of the allegations that help us to prove their liability under COPPA as a whole.

THE COURT: That's not an answer to my question.

If you don't concede the theory, then at trial you would ask me to give the jury an instruction under both theories to prove the same claim. So doesn't that mean you would take discovery on that theory?

MR. EDELSTEIN: Yes, we would.

THE COURT: All right. Let's move to the other argument.

MR. EDELSTEIN: Understood. Thank you, Your Honor.

So a couple of points that Meta has raised.

So first of all, as we said, the AGs have plausibly alleged that a portion -- that portions of Instagram and Facebook are directed to children. Meta's arguments in their motion overwhelmingly are factual disputes and meant to dispute the facts that the AGs have presented as plausible allegations. This is a motion to dismiss, and this is viewed in the light most favorable to the AGs. We have plausibly alleged. This is not an opportunity to dispute what the facts of whether or not a piece of content or an (sic) allegations as a matter of fact and law is -- or is directed to children. We have plausibly made the case.

THE COURT: No. But the issue of whether third-party content can constitute as a portion is an issue of law, not fact.

MR. EDELSTEIN: The -- so the rule states -- actually, what the rule states that a website, or a portion thereof, is directed to children if it's targeted to children.

"Portion" is undefined in the statute and the rule, and where a -- where one of the factors or one of the elements is undefined under the statute or the rule, we would say -- we would put forward that the correct standard and metric is the one that best fulfills the purpose of the statute, which is to protect children online.

Meta's attempt to introduce third-party content as a limiting factor is -- just does not exist in the statute or the rule. And moreover, in the YouTube case, even if it was third-party content and third-party operate -- providers that were posting the accounts and videos on YouTube, ultimately, at the end of the day, it was still directed to children because of those portions, and YouTube was subject to COPPA.

THE COURT: The mixed audience exception, are you arguing that as part of the statute or part of the regulatory scheme?

MR. EDELSTEIN: I believe that the mixed audience discussion comes in with the frequently asked questions.

THE COURT: And Mr. Schmidt?

MR. SCHMIDT: I think that's right. It's not in the statute. It doesn't apply here on its face, but it's not in the statute.

MR. EDELSTEIN: But we -- in terms of that, the rule states that a website or portion's directed to children if it's targeted to children. So if children are an audience targeted by the platforms with an analysis of the factors outlined under the rule, whether or not that audience is the primary audience, then it is directed to children.

THE COURT: You would agree, Mr. Schmidt, do you not, that a motion to dismiss is not the place for the Court to make factual determinations?

MR. SCHMIDT: Yes, and our arguments don't depend on that.

THE COURT: And so in terms of the directed-to-children analysis, given that I can't make factual determinations, other than this issue of third-party content, is there anything really else that's really an issue of law, as opposed to factually deciding whether something is directed versus not?

MR. SCHMIDT: I think Your Honor's hit the primary issue, but I think there's a few parts to that issue in terms of third-party content. There's what the statute tells us that meshes with that issue, that the idea that this hasn't been addressed by the statute we think is just wrong. The statute says we look at whether the operator has directed to children, has targeted to children. So I think the statute does speak to that question. The legislative history speaks to that question on the portion issue by talking about dedicated areas for children. That was what was at issue at YouTube that's not at issue here. And the FTC has spoken to those issues.

There are other parts of COPPA that we think -- there is another part of COPPA that we think is relevant, which is Section 6501(10)(B), which makes clear that a service doesn't become directed to children solely for referring or linking to services that are directed at children. That reinforces this idea that it's what the operator is setting up their website to

do, as opposed to third-party content appearing on their website.

And then, of course, in terms of the broader statutory structure --

THE COURT: But 16 C.F.R., I think it's 312.2, says the platform -- asks the question about whether the platform, quote, targets children as its primary audience. Whether or not something is primary is a factual question. Whether or not something is targeted is a factual question. Isn't it?

MR. SCHMIDT: I think it could be under certain circumstances, but not here.

Here we still have that legal question that Your Honor has identified, which is: Does the simple presence of third-party content that has general appeal, as well as child appeal, convert -- does that mean targeted? And our legal argument is, no, it doesn't. The statute tells us that; the history tells us that; the FTC tells us that.

Just to take one of their examples, they cite a Lego account. That's a general audience account. Certainly kids do Legos. Their parents buy them Legos. Parents, other adults, teens also do Legos. That's a legal question. That doesn't require the Court to resolve a fact about how much of Legos are kids, how much is adults. There's a legal question about whether, when you've had something that has general audience appeal that's operating in the larger setting of a general

audience website, and that there's no dedicated place set up in the website for this kind of content, does that convert the website to a child-directed website? And the statute says no, we think the legislative history says no, and the FTC in pretty consistent guidance says no. And we cite guidence in our brief from 1999, 2006, 2013 that's all in line with us.

In 1999, concerns were raised about the initial COPPA rule, where --

THE COURT: I understand your argument.

All right. Let's move to Section 230.

MR. EDELSTEIN: Thank you, Your Honor.

MR. SCHMIDT: Thank you, Your Honor.

If I may, Paul Schmidt for Meta. We --

THE COURT: You need to identify yourself.

MS. MIYATA: Good morning, Your Honor. Bianca Miyata from the state of Colorado for the state attorneys general.

THE COURT: So part of -- and I'd like to hear from Ms. Miyata. It appears to me that Meta somewhat mischaracterizes the states' theory. So what would you say is the states' theory?

MS. MIYATA: Your Honor, under Section 230, you know, it appears Meta wants to shield itself with this law, but the states' claims are not aiming to impose any derivative liability based on third-party content. Instead, we're targeting Meta's own strategic business practices, which harm

children. We believe that to the extent necessary, the Court could distinguish its ruling barring the personal injury plaintiffs' claims on certain features that also underlie the state claims here, because design defect claims and unfairness claims are fundamentally different. Should the Court disagree, we are respectfully requesting that the Court reconsider its previous order as to the features raised by the states. I'd like to speak a little bit to how the Court could, on a principled matter, distinguish its ruling here, and how the AGs' claims are really different from the private plaintiffs' claims.

The Ninth Circuit has paved the way for a court to reach different conclusions about Section 230 immunity when looking at two claims on two different legal theories, but that address the same conduct. And that is in *Barnes versus Yahoo*. In *Barnes*, I think as the Court knows, a plaintiff wished for Yahoo to remove explicit content that had been posted against her will. The Court barred the plaintiff's negligent undertaking claim but went ahead and allowed a claim for promissory estoppel to move through.

THE COURT: You're speaking too quickly.

MS. MIYATA: Apologies. I will slow down.

In that case, even though the end result under either claim and the facts underlying those claims were the same, the Court held that promissory estoppel, unlike negligent

undertaking, would not have required Yahoo to remove any third-party user-posted content.

And that is exactly so here. In this case, the states are seeking relief based on unfair business practice claims that do not require Meta to remove, alter or publish any third-party content.

THE COURT: Mr. Schmidt?

MR. SCHMIDT: The states are asserting the same theory, in our view, that the personal injury plaintiffs were asserting, which is harm from publishing activity, and we think -- the only issue I was planning to address until the states raised this as the failure to warn issue, which, if I may, I'll come back to.

But in terms of the states' arguments, first, the law is very clear that Section 230 cuts across claims. There's no magic to shifting a theory of the claim that takes it outside of Section 230. ***Kimzey*** tells us that very directly, from the Ninth Circuit, in terms of saying that you can't avoid Section 230 through creative pleading to advance the same argument that the statute plainly bars. In a listing of the types of claims that are covered by Section 230, the ***Zango*** case that we cite in turn invokes the perfect 10 case for the proposition that the CDA protects against state unfair competition claims.

Where their claims are based on the same kind of

publishing activity as the personal injury claims are -- and they very clearly are here. They're probably a little narrower in terms of the features they're challenging, but they're challenging some of the same features that the Court already addressed. There's no distinction between challenging that type of publishing activity in the context of a consumer protection claim, challenging it in a design defect claim, and I'd like to have a minute to address challenging in a failure to warn claim.

And *Barnes* actually stands for that very proposition. The argument that was made was that there were no factual differences between the claim that was allowed to proceed and the claim that was not allowed to proceed, and that's just not accurate as to what *Barnes* held. What *Barnes* hinged the one claim it could proceed on --

THE COURT: Mr. Schmidt, you, too, are -- I know this is early. It's probably been a long week. It certainly has been for me. But you all drank too much coffee. You're talking too fast.

MR. SCHMIDT: Sorry, Your Honor. That is a problem I have.

Barnes involved distinct conduct from publishing activity, a separate promise that was not honored, to take action that was certainly related to publishing conduct but that was not itself a form of publishing content -- conduct. And that's why

the *Barnes* court precluded every other claim in the case but allowed that one claim to proceed.

In the words of the Court, contract liability here would not come from Yahoo's publishing conduct but from Yahoo's manifest intention to be legally bound, legally obligated to do something. That's not applicable here. Here, the publishing conduct that they're challenging is the identical conduct in terms of algorithms, other features that Your Honor found was publishing conduct in its 230 order.

THE COURT: So on your side I understand you think that this is the same issue, and perhaps it is. By the same token, you also concede, right, that claims of -- their claims of deception are not barred by Section 230 to the extent that they're based on Meta's own affirmative representations?

MR. SCHMIDT: We have not moved on that basis, correct, Your Honor, under 230.

THE COURT: You have moved a couple of times in the briefing, or have mentioned a couple of times in the briefing in footnotes -- you know, there's lots of Ninth Circuit authority that says that you can't bring a substantive motion for relief if you put something in a footnote. There's also Ninth Circuit authority which indicates that you can't bring a substantive request for relief when you put something in your reply. And here, you raise only on reply this multiple accounts function, which was not previously addressed.

You want to address that topic?

MR. SCHMIDT: Yeah, I think the simple reason for that is what we tried to say in our reply, that when we read the complaint, including their specific delineation of what they were alleging was the violating conduct, they did not include multiple accounts. They had reference in one or two places elsewhere to the multiple accounts issue, but they did not include it in their recitation of the unreasonable acts that they were basing their consumer protection claims on.

And I'm referring specifically to paragraph 847 of the complaint.

So we moved on what was identified as the alleged unfair and unconscionable acts and practices in that paragraph of that pleading where they were summarizing what they were moving on. In opposition, they came in and said, we've got this multiple counts issue. So then we addressed it on reply.

THE COURT: So why wasn't it in 847? I mean, you know, these complaints are hundreds of pages long. Why is it that, you know, defendants can't necessarily, aren't necessarily put on notice if you didn't include it in your summary paragraph?

MS. MIYATA: Your Honor, if I may, the location of those allegations within the complaint is not dispositive. The plaintiff is entitled to organize the complaint as they see fit and to craft a thematic and persuasive narrative regarding

Meta's deceptive and unfair scheme. And the fact that certain features were not specifically highlighted in an end summary in paragraph, I believe you said 847, doesn't necessarily mean that the plaintiff was -- that the defendant was not on notice regarding allegations specifically --

THE COURT: Well, let's say that I do allow them to make this argument. What would your opposition be, since it came in on a reply?

MS. MIYATA: Well, our first-line argument to that would be that it should not be entertained, as the Court has already recognized.

THE COURT: I understand that.

MS. MIYATA: But should it be entertained ...

THE COURT: Right. Assume it is. Then what?

MS. MIYATA: Yes.

Should it be entertained, we believe that the opportunity and the encouragement to young people to create multiple accounts such that a young user doesn't miss any content is one piece of an unfair scheme to exploit young users' particular vulnerability to dopamine triggers. We are not seeking to hold Meta liable for permitting users the opportunity to post content under different names. Instead, just as the Court I think raised earlier and I think Mr. Schmidt has addressed, we are not seeking to hold Meta liable for allowing particular publishing functions to move forward. We are concerned with

the effect and the overall effect of those functions on young people irrespective of the content that is being manipulated, posted and dealt with as a result of these features. The same is true with multiple accounts.

THE COURT: I referenced a footnote. The issue with respect to the footnote was the safe harbor provisions.

MR. SCHMIDT: We don't think that's before the Court, if that makes it easier, Your Honor.

THE COURT: Okay.

MR. SCHMIDT: We highlighted that just as an illustrative point, not to move on that basis.

THE COURT: Okay. Great.

MS. MIYATA: We would agree.

THE COURT: Okay. Anything else on this topic? We can deal with the -- I know people want to talk about the failure to warn, but we can do that later.

MS. MIYATA: Your Honor, if the Court would indulge the states in creating a brief record I think regarding the request to address particular features, we would appreciate the opportunity to discuss that.

THE COURT: Okay. I'm not going to spend a lot of time, but go ahead.

MS. MIYATA: Understood.

Your Honor, we think there are multiple reasons that the Court could either distinguish its ruling about particular

features, or should the Court be so inclined, revisit its ruling regarding particular features. And that would be in keeping with the Ninth Circuit's definition of a publisher function, as well as considering the fact that we are asking the Court to look at features employed by many 21st century businesses who are using new technologies that have never been considered, I think, by the Ninth Circuit.

Some features that we believe the Court's order previously addressed would be, for example, the algorithm, the infinite scroll, and the notifications, as well as likes. And we would point out to the Court that these are features that, while used by Meta in the course of its business, are not exclusively used by Meta or by other businesses that are engaged in publishing, and I think that's really critical. As the Court has correctly noted in its previous order, that to be subject to Section 230 immunity, conduct needs to be identical with publishing, not just tangentially related. We certainly agree that, you know, in the same vein as *Lemon* here or *Doe versus Internet Brands*, because Meta is engaged in publishing generally, it could be said to be a but-for cause for everything they do. But what they are seeking here is broad across-the-board immunity for all of their actions, and that would really be in contravention of the purpose of Section 230.

THE COURT: Well, let me ask this, because Meta originally wanted to appeal my decision --

MS. MIYATA: Yes.

THE COURT: -- and sought to have my approval on that. I denied it, in part because I wanted to make sure we got through the state AG's complaint.

Let's assume for purposes of argument that I continue with my approach to the more specific analysis that I did with the individual plaintiffs and apply that, as well, to the state AGs' complaint. At that point, you know, do both parties want to take it up to the Ninth Circuit to get the Ninth Circuit review in parallel? I won't stay this case, because it takes so much time to get through circuits. Although, I have to say Judge Murguia has done a great job in getting the Ninth Circuit's backlog done, so they are moving things much more quickly.

So would the state AGs want to do that, as well, on that narrow issue, so that there's a bit more clarity as we move forward?

MS. MIYATA: Your Honor, it's our position that even if the Court were to employ its feature-by-feature analysis here when considering the actual conduct that the state AGs are attempting to find to hold Meta responsible for, those are not publisher functions. So under any approach, we believe the Court could, on a principled basis, reach a different conclusion here. If the Court were not to reach that conclusion, I'm not in a position to say what next steps would

be taken by the states today.

THE COURT: Okay. Okay. Can we move on now?

MS. MIYATA: Thank you, Your Honor.

THE COURT: All right. Let's move ahead to deceptive acts and practices. I believe I've got Mr. Hester and Ms. Bidra?

MR. SCHMIDT: Yes.

May I come back on the Section 230 failure to warn issue? Because that's the one issue we didn't have a chance to argue at the prior hearing that we did want to have the chance to --

THE COURT: No, I'll do it later.

MR. SCHMIDT: That's all I'm asking, Your Honor. And my co-counsel might want to address the last question.

MR. DRAKE: Yes, Your Honor. Good afternoon. Geoffrey Drake, King & Spalding for the Tiktok defendants.

I believe Your Honor just inquired as to whether the parties might be interested, depending on Your Honor's ruling on this motion, whether now might be a good time to take some of these issues related to the 230 ruling, whether on design defect and/or failure to warn, up to the Ninth Circuit. And speaking on behalf of Tiktok, and I believe joined in part by Snap, and perhaps others may feel the same way, I don't know the complete lay of the landscape, Your Honor, but we do think that that could be appropriate at this time. It's something we're considering, and we didn't want to let Your Honor not be

aware that it was on our minds.

Thank you.

THE COURT: Thank you.

MR. SCHMIDT: And Meta does agree with that view, that 1292 review would be appropriate at that time.

THE COURT: Okay. Deceptive acts and practices.

MS. BIDRA: Your Honor, may I clarify? Previously -- Lauren Bidra, for the record, Your Honor.

Previously you listed unfairness as coming before deception. I just want to clarify whether you want to hear unfairness or deception next.

THE COURT: You're right, unfair and unreasonable next.

MS. BIDRA: Thank you, Your Honor. I'm prepared to address that today for the state attorneys general.

MR. HESTER: Your Honor, Timothy Hester, Covington & Burling, on behalf of Meta.

Your Honor, as I contemplated this argument and all of the state-by-state laws we're going to be discussing, I thought it would be very helpful for the Court and the parties to have a very simple one-page demonstrative that just lists out the states, so that we don't have to spend time reading off a bunch of names of states to the Court, and I thought it would help us keep track of things. These are all points that are sourced out of our briefs.

If I could, if the Court would be willing, I would propose to hand it up to the Court and to the parties.

THE COURT: All right. Why don't we -- can we turn on the ELMO, if you have a copy? How many? Do you have three for me?

MR. HESTER: Yes, I do, Your Honor.

MS. BIDRA: Your Honor, if I may please be heard?

To my knowledge, state attorneys general have not been given notice of this, so if --

THE COURT: Okay. Noted.

MS. BIDRA: Thank you.

THE COURT: It means that you have to take fewer notes.

And let's turn on the ELMO, and then everybody else can see it.

She's right. In general, PowerPoints, handouts, I usually require 24 hours. It's in my standing order. Make sure you've read it and follow it.

MR. HESTER: Apologize, Your Honor.

Let me begin by addressing why the attorneys general cannot assert unfair practices claims.

Of the 34 states that are covered by the motion to dismiss, 26 states assert claims for unfair practices. And of those 26 states, 18 states are subject to the FTC Section 5 standards, and that's discussed in our brief at page -- at 39

to 41. Under the Section 5 standards there are three prongs, and the *FTC v. Neovi* decision out of the Ninth Circuit articulated them: "An unfair practice is one that causes substantial injury to consumers that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers."

I want to focus on the substantial injury point. That's the clearest issue to resolve on a motion to dismiss. In the *American Financial Services* case the Court said: "As a general proposition, substantial injury involves economic or monetary harm and does not cover subjective examples of harm, such as emotional distress." And the Court went on to say: "Emotional impact and other more subjective types of harms would not make a practice unfair."

Now, the states quote an FTC statement from 1984 that, quote: "Unwarranted health and safety risks may also support a finding of unfairness," but they cropped the quote, and they omit the next sentence from the FTC's statement, which, again, says: "Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair." That's a quotation out of *International Harvester*, 104 F.T.C. 94' --

THE COURT: I'd like a response on that.

MS. BIDRA: Yes, Your Honor. Thank you.

To take up the first point, the state AGs have briefed and today again disagree with Meta's characterization of what

states follow the FTC standard. Many of our consumer protection statutes state that states are to be guided by the FTC, which is not the same, and it's legally distinct from follow the FTC. Our surreply chart, Appendix C, lists the nuances of how our individual states treat unfairness.

Secondly, with regard to substantial harms, here, the states have plausibly pled that young users, young people, have suffered substantial harm from use of Meta's products. These substantial harms are not merely speculative nor emotional. They include eating disorders, insomnia, anxiety, depression and even suicide.

The FTC has spoken on this, as my colleague from Meta pointed out, and specifically stated that unwarranted health and safety risks do support a finding of unfairness. And to reiterate, Your Honor, we are not here alleging merely emotional harms.

MR. HESTER: Your Honor, if I may just respond briefly.

I don't think counsel has answered the point. Counsel has again quoted the statement from the FTC: "Unwarranted health and safety risks may support a finding of unfairness," but the states have cropped the quote and omitted the next sentence.

THE COURT: Well, the first thing she said is that they don't all follow the FTC, despite what you argue.

MR. HESTER: Well, I think --

THE COURT: And guidance and -- guidance is different.

MR. HESTER: Well, Your Honor, I would address that in three parts.

There are 13 statutes that specifically incorporate the FTC Section 5 standards. There are four state supreme courts that have said their statutes are governed by Section 5, even though the statutes don't, on their face, say that. So that gets us to 17. Then we get New York, which specifically bases its unfair practices claim on a violation of FTC Section 5. So we could quibble around the margins as to whether it's at 18, is it 16, but I think the point is there's a very substantial body of these state AGs whose law is governed by FTC Section 5, and they have not come back to dispute the core points about how that standard would be applied to their claims.

So I think I -- I would submit, Your Honor, that there's maybe marginal differences, but it's very clear that under most of these state laws, FTC Section 5 is the governing standard for determining an unfair practices claim.

So let me go on, if I may.

THE COURT: What does one do with the fact that it costs money to have psychiatrists, it costs money to have psychologists, it costs money to go to the doctor to deal with eating disorders? All that costs money. All of that is real harm. It costs school districts money to have more counselors

to deal with the fact that these children have these effects. How can you ignore that in terms of this argument?

MR. HESTER: Well, Your Honor, I -- we're really focusing on what's pled, and what's pled is emotional harms and other impacts that are more subjective.

And if -- for instance, in paragraph 508 of the consolidated complaint, the states allege there are higher rates of anxiety, depression, sleep disturbances, other mental health concerns. We don't diminish those, but the case law is clear that that is not a sufficiently concrete allegation of harm to support a claim, and --

THE COURT: All right. Your response?

MS. BIDRA: Your Honor, our complaint has plausibly pled concrete substantial injury under the FTCA standard; more than emotional harm, more than anxiety.

THE COURT: I need paragraph numbers that I can look at.

MS. BIDRA: Paragraph 508 has pled anxiety, depression, insomnia and anxiety. There is more on eating disorders in paragraph 204.

Your Honor --

THE COURT: The argument is that those kinds of harms aren't covered. Are they, or are they not?

MS. BIDRA: Yes, Your Honor. Under the FTCA standard, the harms plausibly pled in the state attorneys

general complaint are covered.

The courts have also recognized that consumer injury is substantial when it is the aggregate of many small, individual injuries. So although we are not suggesting these are small injuries, it is also appropriate to look at the magnitude. Here in our complaint, we have user counts pled for each state in our coalition, paragraphs 80 to 81, which do demonstrate the magnitude of young people affected and harmed.

To continue on with that, Your Honor, paragraphs 515 and 542 of our complaint show how young users are up all night checking their phones, suffering from insomnia and the attendant physical harms with young people not sleeping. Paragraph 542 shows the negative impact that sleep has on young people.

MR. HESTER: Your Honor, if I may respond briefly to that.

I think counsel's argument makes my point. The FTC has made is very clear that, quote: "Emotional impact and other more subjective types of harm will not ordinarily make a practice unfair." The allegations that counsel has just recited fall exactly into that bucket. We don't diminish the significance of the allegations, but they don't fit within the FTC Section 5 standards, which require something much more concrete, economic or monetary harm or something that is much more measurable than these kinds of subjective impacts. That's

why they can't state a Section 5 claim.

THE COURT: How do you address that explicit language?

MS. BIDRA: That, Your Honor, the FTC has stated that unwarranted health and safety risks, which clearly we have plausibly pled here, that there are unwarranted health and safety risks to young people from use of Meta's platform.

I would also call the Court's attention to ***FTC v. Accusearch***. This is a case in which the defendant released personal phone records to folks who would pay for them, such that the phone records were released to stalkers and abusers. And the Court held that: "The release of these consumer phone records led to a host of emotional harms that are substantial and real and cannot fairly be classified as either trivial or speculative."

MR. HESTER: Your Honor, I don't want to repeat myself, but --

THE COURT: Well, then you shouldn't.

MR. HESTER: I'll try not to.

When counsel says that the FTC says unwarranted health and safety risks may support a finding of unfairness, they're not mentioning the next sentence, which says: "Emotional impact and other more subjective types of harm don't" --

THE COURT: So emotional impact and other subjective harms. An eating disorder is not an emotional impact.

MR. HESTER: It would be a subjective harm within the meaning of that language, Your Honor.

THE COURT: How is this -- how is it a subjective harm if there is a medical classification for that?

MR. HESTER: Well, Your Honor, the nature of eating disorders vary person by person. It's quite a subjective standard.

THE COURT: Well, so do heart conditions.

MR. HESTER: Your Honor, the allegations are much more general. They're --

THE COURT: Of course, they're general. It's the attorney general. That is, they're not going to -- they don't have to -- there's no pleading standards that they identify every single person in their jurisdiction.

MR. HESTER: Understood, Your Honor.

But nonetheless, the point is that the FTC Section 5 standard has not been applied there. There is not a single case that has applied FTC Section 5 to these kinds of injuries that are alleged here.

The ***FTC v. Accusearch*** case which counsel just cited, in that case the Court found documented economic harm, quoting from star page 8 of 2007 Westlaw 4356786. So that was a case that involved documented economic harm, in addition to other kinds of emotional injury that were at issue there. There is no case that has ever applied Section 5 to these kinds of

allegations.

THE COURT: Well, it's new technology.

MR. HESTER: Well, Your Honor, it may be new technology, but the kinds of harms that are being alleged here are the kinds of harms that could have been alleged over the last 20 years of FTC jurisprudence. And the case law --

THE COURT: So in *Neovi versus FTC*, or *FTC v. Neovi*, Ninth Circuit case, that case indicates that a small harm to a large number of people can be substantial under the FTC act. Right? So that satisfies at least one element.

MR. HESTER: I agree, Your Honor.

THE COURT: Okay. So why doesn't it fall within the context of that case?

MR. HESTER: Because the *Neovi* case specifically said -- relied again on this test that there has to be an economic or monetary harm, that that is the norm for a Section 5 claim. That was the -- *Neovi* was quoting to *American Financial Services* for that test.

So even in the --

THE COURT: But does *Neovi* apply or not?

MS. BIDRA: Yes, Your Honor.

THE COURT: And what about the economic reference that he's just mentioned? What's your response there?

MS. BIDRA: It's not dispositive, Your Honor, whether there is an economic impact. The courts have recognized that

consumer injury counts when it is a health risk. As Your Honor stated before, these are medical conditions: Insomnia, anxiety, depression. They're not trivial, nor are they speculative.

THE COURT: Well, what about *FTC versus Accusearch*, which was affirmed by the Tenth Circuit? There, the district court indicated that -- well, there, there was economic harm evidence, and it says: "In addition to economic harm evidence of a host of emotional harms that are substantial and real cannot be fairly classified as trivial or speculative;" that those can be caused by unlawful business practice.

Doesn't that get them over the hump?

MR. HESTER: I don't think so, Your Honor, because one key part of that record that the Court highlighted was documented economic harm. We don't have that here. There's not an allegation of a documented economic harm. It's not alleged in the complaint. The way they have alleged the complaint and the way counsel has described the harms today, those are exactly the kind of, what the -- what the FTC has called --

THE COURT: What was the procedural posture of that case?

MR. HESTER: In *FTC-Accusearch*?

THE COURT: Yes.

MR. HESTER: I bel' -- well, Your Honor --

THE COURT: As I sit here today, it is plausible to me that they could get you thousands and thousands and thousands of medical bills for all of the harm that they have identified here in terms of the economic injury caused by those disorders.

MR. HESTER: They haven't alleged it that way, Your Honor. I --

THE COURT: It's not --

MR. HESTER: I understand.

THE COURT: The question is whether it's plausible.

So I get them to add another sentence, so -- to the complaint? That's why I ask, what was the procedural posture?

MS. BIDRA: I believe that case had gone further, Your Honor, than motions to dismiss, but I don't have it in my head as I stand here.

THE COURT: Okay. How about one of the other hundred lawyers in here? Maybe one of you could figure out what the procedural posture is of that case for me.

MR. HESTER: I could check, Your Honor, if the Court would like.

THE COURT: You've got people behind you. Just stay at the mic.

Will somebody raise their hand when they get it for me?

MS. BIDRA: Your Honor, may I be heard on one further point for *Accusearch*?

THE COURT: You may.

MS. BIDRA: To counsel's point about attendant economic harm, that was not the case for all of the harmed individuals. The economic harm was the cost of changing your phone number, and that was not across the board for all the plaintiffs in this case. They all did not change their phone number. What they all did was suffer from being stalked and abused when their phone records were unlawfully disclosed.

THE COURT: Okay. We're going to move on.

MR. HESTER: Thank you, Your Honor.

The next states I wanted to address were Minnesota and Missouri, which apply some version of the *Sperry* test, and the *Sperry* test has been discredited at the federal level but still seems to be applied in at least those two states.

In Minnesota and Missouri, they recognize that an unfair act can be one that offends public policy, or is unethical, or oppressive, or unscrupulous, or presents a risk of substantial injury to consumers. We've already been talking about substantial injury, so I won't go back to that, but I don't think they can meet the standards under either Minnesota or Missouri law for an immoral, unethical, oppressive or unscrupulous conduct.

That's really best demonstrated by the *City of Chicago v. Purdue Pharma* case, where the Court held that --

THE COURT: Who decides whether what the defendants

are doing, whether that conduct offends notions of immoral, unethical, oppressive, unscrupulous or substantial injuries to consumers?

MR. HESTER: Well, I think it's -- at the first level it's a pleading question. It's whether they've pled sufficient allegations to establish that.

THE COURT: And you don't think that conduct which affects millions of -- potentially millions of children is sufficient?

MR. HESTER: I would -- I would -- I would say --

THE COURT: It seems all you have to do is look at the newspaper, and you can see that there's plenty of people who think that it does.

MR. HESTER: Well, Your Honor, I --

THE COURT: So it's plausible.

MR. HESTER: I would point the Court just quickly to the *Purdue Pharma* case, where the allegation was that *Purdue* had falsely represented the attributes of opioids, and that had led to widespread abuse, addiction, an entire opioid crisis triggered by *Purdue*'s conduct --

THE COURT: Circuit case or district court?

MR. HESTER: It's a district court case.

THE COURT: Well, then I might disagree with my colleague.

MR. HESTER: But I -- it's the best authority that

we've been able to identify on how that standard is construed, Your Honor.

THE COURT: It's a pretty fact-based inquiry.

MR. HESTER: Let me move on, if I may, Your Honor.

MS. BIDRA: Your Honor, may I respond to the points said thus far?

THE COURT: You may.

MS. BIDRA: Thank you.

Loomis v. Slendertone Distribution is a Southern District of California case that finds that unfairness and whether unfairness has been met is inappropriate at the 12(b)(6) standard, to first address that.

Second, my colleague from Meta has also raised the *Sperry* standards, and the states that follow *Sperry*, also known as the cigarette rule, have all plausibly pled each specific prong of *Sperry*.

On the prong of whether Meta's conduct is immoral, unethical, oppressive or unscrupulous, Your Honor previously referred to *21st Century Technologies*, and what Meta is doing here is different than other commercial actors in the way it takes young users' data and uses it against them. That is what is manipulative, Your Honor. This is hidden from young users. They have no way of knowing this, and their individual vulnerabilities, their sensitivity to dopamine are exploited by Meta, and that makes their practices immoral, unethical,

oppressive or unscrupulous.

We have also met the public policy prong of *Sperry*. We have plausibly alleged that Meta has violated COPPA and a host of other state laws to protect minors from -- to protect their privacy online and to protect them from addiction.

And the final prong of *Sperry*, Your Honor, is the substantial injury prong, which we have already discussed under the context of the FTC standard.

THE COURT: With respect to the breakdown, I don't have -- I don't have a side-by-side with your chart. This Roman numeral I, you agree with his sub 2? That is, the two states that follow the *Sperry* test. Is that correct?

MS. BIDRA: No, Your Honor.

Again, for the record, this is the first time I'm reading this document, but these -- more states than just Minnesota and Missouri follow the *Sperry* standard, and I would call the Court's attention to the state attorney generals' surreply, Appendix C, where we have annotated how each state in our coalition follows the FTC *Sperry* standard.

THE COURT: We'll do a side-by-side.

MR. HESTER: Your Honor, I have one question -- answer for you on *Accusearch*. That was on cross motions for summary judgment.

THE COURT: Makes a big, big difference.

MR. HESTER: I understand, Your Honor, but I guess

I'm still trying to focus on the allegations.

THE COURT: Well, you're trying to represent your client. Frankly, it doesn't take me too much to get beyond that particular issue. There is no transparency. There is manipulation. And some of it may be protected under Section 230, but despite public statements by the CEO.

All right. Next issue.

MR. HESTER: Your Honor, if I can move on. I am listening to the Court, and so I want to move on to some other states where I think there may be a slightly different analysis.

There's five states in our viewer, Colorado, Indiana, Kansas, New Jersey and Oregon, where the statutes don't recognize a claim for unfair practices without deception. In other words, they don't permit or contemplate a separate standalone unfair practices claim. We've addressed those in our motion and in our reply. I just wanted to highlight a few points.

As to Colorado, the states include a footnote in their opposition that we're relying on cases that predate a statutory amendment clarifying that the statute extends to unfair practices. With respect, we submit that's not correct. A court in this district recently rejected that very argument and held that the provisions of the Colorado statute, quote, "prescribe only deceptive conduct." And that's the *HIV*

antitrust litigation.

As to Indiana, the states argue that the opinion we cite didn't discuss whether a claim for unfair acts could be brought without a corresponding deceptive act, but that case construed the current Indiana statute and held it only applies to misleading acts or acts otherwise prohibited at law. And that's the *Crum* (phonetic) decision out of the Southern District of Indiana that we cite in our papers.

As to Kansas, the states do not dispute that Kansas requires some element of deceptive bargaining conduct.

As to New Jersey, the state asserts a claim only under the New Jersey Consumer Fraud Act, and the New Jersey case law makes absolutely clear that the fraud act requires deception, fraud or false pretense.

Finally, as to Oregon.

THE COURT: So with respect to New Jersey, is it your argument that the Court equates unconscionability with deception?

MR. HESTER: Yes; and that's the way the case law has read it.

THE COURT: How about you on *Kugler v. Romain*?

MS. BIDRA: Yes, Your Honor.

May I have an opportunity to go back to previous points after I address Your Honor's present question?

THE COURT: Fine.

MS. BIDRA: Yes, Your Honor.

For New Jersey, may the -- would the Court mind refreshing me on the question?

THE COURT: The argument is that in *Kugler*, K-u-g-l-e-r, the Court appeared to equate -- they're arguing that the Court appeared to equate unconscionability with deception. Do you have a counterargument on that issue?

MS. BIDRA: Yes, Your Honor.

Based on the plain language of the New Jersey Consumer Fraud Act, that is not accurate, Your Honor. There is separate unconscionability under the New Jersey law, and that was amended, Your Honor, after *Kugler*. *Kugler* was decided in 1971, and the New Jersey Consumer Fraud Act was thereafter amended to include this theory.

THE COURT: So on~-- with respect to the five states that only reference deceptive unfairness claims, if the Court holds that deceptive acts and practices survive, does it really matter? Don't the claims of unfairness also survive apropos, you know, our discussion earlier? You've got a claim that survives regardless of the -- even though you have one theory as opposed to two. Even our UCL has, here in California, has three different tracks. So you still get a UCL, and you have three different routes to get there.

So doesn't -- the unfairness issue, doesn't it effectively become moot?

MR. HESTER: I don't think so, Your Honor. It's a question of weeding the garden and cleaning things up. This is the process, as I have seen it, of an MDL court, and I think the Court is working hard on that already, trying to winnow claims so that it becomes more manageable and workable. This is a lot -- there's a lot of theories here, and helping the parties winnow it down to something that is more manageable is very helpful, especially in this MDL context. And I -- and, Your Honor --

THE COURT: I understand the argument.

You wanted to talk about another state?

MS. BIDRA: Your Honor, I'd like to respond to the point my colleague from Meta just made.

The states all have unfair or unconscionable acts, of the ones that brought it, practices as part of their jurisprudence. And under any standard, the state attorneys general have met their burden to plausibly plead the unfairness test. That the states have different standards is not dispositive. At this stage we have plausibly pled every standard, and the attempt by my colleague from Meta to confuse the differences in state laws does not negate that we have plausibly pled unfairness under any standard.

THE COURT: Okay.

MS. BIDRA: For the sake of efficiency, Your Honor, the states that my colleague has brought up are all briefed

separately --

THE COURT: Yep.

MS. BIDRA: -- in our opposition.

MR. HESTER: Yes.

Your Honor, there was one state I didn't finish in this litany of the five I was talking about that didn't recognize a claim for deceptive -- for unfair practices separate from deception, and that's Oregon. And I simply wanted to highlight as to Oregon that the statute, by its terms, only applies to the selling, renting or disposing of services. That point is unanswered by the states in their opposition.

THE COURT: Okay. Response?

MS. BIDRA: Yes, Your Honor.

The State of -- for the State of Oregon, the unconscionable tactics listed in their Oregon consumer protection statute are not limited to conduct enumerated. That's a case *Gordon v. Rosenblum*. And even so, if it were so limited, Oregon revised statute 646.605(9)(a) shows that: "Unconscionable tactics include knowingly taking advantage of a customer's physical infirmity, ignorance, illiteracy or inability to understand the language of an agreement."

Here, we have Meta using unconscionable tactics when it takes users' data and uses it against them in the way the platform is designed, to take advantage of their sensitivity to dopamine hits, to always being present to know what their

friends are doing.

So for the state of Oregon, we have clearly pled that standard.

THE COURT: Okay.

MR. HESTER: And, Your Honor, just very quickly on that.

That doesn't answer the point, because the unconscionable tactics only apply in relationship to the selling, renting or deposing of services. That's the threshold definitional bar to the claims under Oregon law.

THE COURT: Any comment?

MS. BIDRA: My colleague will discuss the trade or commerce aspects of this claim.

THE COURT: Okay. I think that does it for the two of you, correct?

MR. HESTER: Your Honor, I was going to cover the separate point about whether the consumer protection claims apply at all here, or the consumer protection statutes apply at all, but I don't know if the Court wants to sequence it differently. That would be the point I would cover next, but I wasn't sure how the Court wanted to handle this.

It's this question of whether -- whether these statutes apply where they involve definitions such as a sale, lease or assignment of services, whether the statutes even apply. It's part two of my demonstrative here.

THE COURT: All right. Well, part of this goes to trade or commerce.

MR. HESTER: Yes, Your Honor.

THE COURT: So trade or commerce relates to sub 3. What about -- oh, I see what you're doing on sub 2.

Okay. Why don't we go ahead and take our break. Then we can start up with that again. We'll stand in recess until 12:15.

MR. HESTER: Thank you, Your Honor.

MS. BIDRA: Thank you, Your Honor.

THE COURTROOM DEPUTY: Court is in recess.

(A recess was taken from 11:39 a.m. to 12:15 p.m.)

THE COURT: You may be seated.

Let's go ahead and continue, Mr. Hester.

MR. PANEK: Your Honor, if I may, please, briefly. Gabriel Panek from Lieff Cabraser for the personal injury plaintiffs.

We just wanted to ask if Your Honor has a preference with regards to hearing argument on Counts 7, 8 and 9 from the personal injury plaintiffs' complaint at the end of the conclusions of the remainder of the argument with respect to the attorneys general, or if you would like us to address the points as they are made throughout the afternoon?

THE COURT: No, I think you can do it separately.

MR. PANEK: Okay. Thank you.

THE COURT: Mr. Hester.

MR. HESTER: Thank you, Your Honor.

We've been discussing thus far the unfair practices claim. I now wanted to turn to a separate point, which is, from among the 34 states that assert consumer protection claims, the statutes of 17 of them do not apply to the use of a free service, and --

THE COURT: You call it free?

MR. HESTER: Excuse me?

THE COURT: It's just an interesting use of a term, the word "free". It somehow suggests that they're not making money, which isn't the case. But, okay.

MR. HESTER: Well, Your Honor, if it would be helpful I could go right to that point, if it would be useful.

THE COURT: Data has value. You understand that, right?

MR. HESTER: I understand, Your Honor. But maybe I could speak right to that point.

There's a decision that's, I think, right on point, the *In Re: Yahoo Customer Data Security Breach Litigation* decision by Judge Koh from 2017, cited at our brief at --

THE COURT: 2017, when she was a district court judge, not a Ninth Circuit judge.

MR. HESTER: Yes, yes, Your Honor. 2017 Westlaw 3727318, at 32 to 33.

In that case, Judge Koh was construing the terms of the CLRA, which, by its terms, defined a consumer as an individual who sells or acquires, by purchase or lease, any goods or services. And Judge Koh in that case held that the CLRA did not apply to the use of a free service -- that was Yahoo's service -- because the statute only applies if consumers purchase or lease the good or service, and she rejected --

THE COURT: Did she indicate in there whether there was any -- well, first of all, what was the procedural posture?

MR. HESTER: The procedural posture, Your Honor. I think the case had gone further, but I can check that.

THE COURT: You should all remember, I'm always asking that question, what's the procedural posture?

So for the young lawyers in the room, I don't know if there are any, procedural posture matters, because the lens with which the Court views arguments at a motion to dismiss stage is quite wide; that is, is it plausible. That's a very different lens than when we look at summary judgment.

MR. HESTER: And, Your Honor, the case I'm discussing from Judge Koh was an order granting a motion to dismiss.

THE COURT: All right.

MR. HESTER: And the reason I had not focused on the procedural posture was because she made a legal ruling that I really wanted to highlight for the Court. And there, she rejected the argument that the collection of personal data to,

quote, "maximum profits through targeted advertising," meant there was a purchase or sale. In quoting from her opinion: "The fact that defendants store personal information and use this personal information for targeted advertising does not indicate that plaintiffs purchased or leased."

THE COURT: What did she do in terms of the Google cases subsequent to that? Because she let a series of claims go through, and Google just settled those cases for a substantial amount of money.

MR. HESTER: I'm not sure that this same issue was presented, Your Honor. This was -- the specific issue she was addressing here was under the CLRA. Some of the other California statutes raised do not present the same issue, because they don't have the same defined terms.

THE COURT: Like the UCL.

MR. HESTER: Yes, exactly, exactly.

But the CLRA does have this specific definition that I think is quite apropos here.

THE COURT: Well, I'm not seeing California as part of the claims, so ...

MR. HESTER: No, but I think that the analysis goes to the Court's question about whether the fact that consumer data is used by a service like Meta, whether that constitutes a purchase or a sale. And Judge Koh rejected that, and she said: "The mere fact that Yahoo gained some profits from plaintiffs'

use of Yahoo's free e-mail services does not, by itself, establish that those plaintiffs purchased those services from defendant." And she said: "The Court is not aware of any legal authority to support the theory that the transfer of personal" --

THE COURT: I understand the argument. A response, and I need your name, please.

MS. SMITH: Yes, this is Anna Smith on behalf of the state attorneys general, from South Carolina.

I think initially, you know, we would say that the CLRA is not at issue here, and California law is not in dispute as to whether or not trade or commerce or a consumer transaction applies. And so in response --

THE COURT: Do you have any -- look, Judge Koh is a very well-respected jurist.

MS. SMITH: Sure, sure, sure.

And I think we would point to, which is also in our briefing, *State V. Google*, which actually is disputing whether or not -- which is in Arizona, not in California. But where the judge there did say that providing location data in exchange for the use of apps or other services can be considered valuable --

THE COURT: You need to slow down, as well.

MS. SMITH: Yes, yes, Your Honor. I'm sorry.

THE COURT: And I don't see Arizona on this list

either.

MS. SMITH: Yes, Your Honor.

Yeah, Arizona is not -- I do not believe that the -- Meta has disputed Arizona. We are just using it as a reference point for this distinct issue of whether or not the consumer data --

THE COURT: Is your Section 2 not comprehensive?

MR. HESTER: My -- my --

THE COURT: Arizona -- is there a consumer protection claim brought by Arizona? And, if so, why is it not on this list?

MR. HESTER: No, Arizona is not part of our motion, Your Honor.

THE COURT: But they did bring it.

MR. HESTER: We haven't brought a claim, a motion to dismiss --

THE COURT: That wasn't my question.

Did Arizona bring a consumer protection claim? And, if so, then it sounds like what I'm hearing is that you concede that, under Arizona law, the consumer protection claim would survive. Everybody agrees that in Arizona it survives; in California it doesn't. So they're going to -- plaintiffs are going to focus on the Arizona view to support all of these other states, you're going to rely on California to support your arguments, and there is silence with respect to all the

other states on this particular issue.

MR. HESTER: No. I -- Your Honor, I would say, first of all, the reason -- we don't mean to concede anything as to Arizona. We didn't move as a matter of law on Arizona because of some of the case law.

The *Google* case that counsel was just talking about involved deception as part of the process of selling and advertising Google products, including smartphones. So it's a different -- it's a different fact scenario from what we're talking about.

I was pointing to Judge Koh's decision really to answer the Court's question about the sale of data, but Judge Koh's decision is not the only one that reaches this issue.

In the *Ziencik* case that we also cite in our brief reply 29, where it said: "Plaintiffs have cited no authority for the idea that exchanging personally identifiable information for use of a free social network application constitutes a purchase or sale."

And in the *Indiana v. Tiktok* case the Court said the same thing. It rejected the argument that the free use of Tiktok is a sale, because Tiktok profits from consumers who use the platform.

So I wanted to make the point to the Court right out of the box that there is a general recognition in the case law that the use of consumer data -- obviously consumer data is

developed and used by Meta for various reasons, but the use of that consumer data doesn't turn the free use of a service into a sale under these cases.

THE COURT: Any other comment? And then we'll move on.

MS. SMITH: I think that we would just like to respond in saying that Meta is not offering anything for free. The fact that a young user does not pay literal dollars to Meta in order to access its platforms does not mean that it's free. And, in fact, this has been pled plausibly in our complaint on paragraph 46 of the complaint. We discuss how Meta has, you know, significant financial interest at stake, and what they are doing is, in exchange for tremendous amounts of valuable data, this young user's personal data, then they are able to convert that into revenue.

THE COURT: So Judge Koh is wrong?

MS. SMITH: Well, I think also in response to that, I think that the CLRA is not the specific thing at issue here, and that how a consumer being narrowly defined doesn't necessarily translate to how a consumer is going to be defined in all of the relevant states at issue here, the ones that Meta has brought a complaint against. And I think a consumer can be defined more broadly, as well as, you know, whether --

THE COURT: What is your best argument for Judge Koh's analysis on this topic?

MS. SMITH: Specifically, that consumer data is not transferable as far as dollars? Is that the specific question?

THE COURT: I don't think he framed it that way, but in the way that Mr. Hester's framed it.

MS. SMITH: My apologizes. I think that --

MR. HESTER: If it helped, I could just read what Judge Koh said.

MS. SMITH: Thank you.

MR. HESTER: She said the statute didn't apply where there's -- there was requirement in the statute of a purchase or a lease, and she said it did not apply to the use of a free service, and she said: "The fact that the defendants store personal information and use this personal information for targeted advertising, does not indicate that plaintiffs purchased or leased a good or service. The mere fact that Yahoo gained some profit from plaintiffs' use of Yahoo's free e-mail service does not, by itself, establish that plaintiffs purchased those services from defendant."

That was her analysis.

MS. SMITH: Yes, thank you for that.

And, Your Honor, to address a few things, again, at issue is not necessarily whether or not a sale is required. So I think that's a very narrow application as far as whether or not there is a consumer transaction at issue.

THE COURT: Well, on their list here, they say that

these consumer protection claims require a sale, lease or assignment or other disposition of a service.

MS. SMITH: Yes, Your Honor. Are you referencing his chart right here?

THE COURT: I am.

MS. SMITH: Yes.

So there are four states that he -- that they identify: Indiana, Kansas, Ohio and Virginia, that do require a consumer transaction. I will point out that there is this idea of even just a disposition of value for property or services, or, you know, that it goes much, much further, and -- than just being a sale or lease. This is -- I think this is very segmented language and is not applying to kind of this whole, you know, broad view of trade and commerce statutes that are to be construed very broadly in its application of whether or not there is, you know, trade or commerce at issue.

MR. HESTER: Your Honor, just to correct the record on one point, we've got five states listed here that require a sale, lease or assignment of assets. That includes Nebraska, which provides for the sale of assets or services as the scope of its consumer protection statute. So in our view that disposes of these five states, because all of them, by their own terms, by their defined terms, don't apply to the use of a free service.

Then in addition, we've got 12 other states to address

that provide for consumer protection statutes that apply to trade or commerce. And, again, downloading a service for free is not trade or commerce. The conventional definition of the word "trade" is the action of buying and selling goods and services. "Commerce," the conventional definition, the activity of buying and selling. So the plain meaning of those terms is reinforced by the underlying statutory definition, except for Hawaii, which doesn't have any definition of "trade" or "commerce". All --

THE COURT: When were those statutes enacted?

MR. HESTER: The statutes that I'm talking about?

THE COURT: Right. Were they enacted before or after the advent of the Internet and the -- and the new technology at issue? Any idea?

MR. HESTER: The Court is asking me some good questions, and I'm not -- I don't have them all at my fingerprints.

THE COURT: Okay. Well, we'll find out, because that matters.

MR. HESTER: So, but I think, Your Honor, again, the point here is that the legislatures have demarcated the scope of these consumer protection statutes.

THE COURT: Well, so these statutes, generally speaking, are quite broad, so that they don't constantly have to be amended to allow for protections of consumers, and that's

why I asked the question.

So if this was enacted in the 1920s, or even the 1970s, then there was no contemplation of what's going on here in 2024.

MR. HESTER: Well, Your Honor, I would have two responses to that.

First of all, the Internet has been around, and the use of these free services has been around for probably 20, 30 years. So the legislatures are certainly well on notice.

THE COURT: Unless they thought that it was captured anyway because they're so broadly interpreted.

MR. HESTER: But the case law has been clear. There have been a number of cases now, including the Judge Koh decision that I referred to, including this *Tiktok* decision, including this recent decision, *Ziencik*. These cases recognize that there's a defined demarcation of the scope of consumer protection statutes, and it's not random that there might be a decision by a legislature that it's going to apply their consumer protection statutes to a range of activity. Not everything is covered by these statutes. It requires certain --

THE COURT: I understand your argument.

Any response?

MS. SMITH: Yes, Your Honor.

To point out, we do think this language here is a bit

cherrypicked for a variety of reasons. For example, the Nebraska statute. While, yes, it does initially say the sale of assets or services, immediately following that is, in any commerce, directly or indirectly, you know, affecting consumers. And it's things like that. And while we, you know, all 12 states he has not gone through, you know, we -- there's very similar broad language that we believe is properly pled to encompass this idea of trade or commerce. It's either affecting trade or commerce or in connection with a consumer transaction, and that's truly what is at issue here.

I would be glad to, you know, also respond regarding the Indiana case. We do think that is just one case. It is even, you know, in one state court. It's currently on appeal, that exact issue of whether or not the other disposition was properly found in that court. And, you know, on the contrary, a state court in Tennessee found the complete, near complete opposite. So we don't think that that is dispositive in this case.

THE COURT: Well, and, again, look, states have the right, based upon principles of federalism, to make those calls, but the notion that -- I mean, I start from a premise that these are broad, because that's, generally speaking, what the intent of them was. But I'll look at them individually.

Let's move on.

MS. SMITH: Thank you, Your Honor.

MR. HESTER: Your Honor, if I may just make one more point before we move on very, very quickly.

Judge Koh was asked to construe the statute more broadly based on the liberal mandate --

THE COURT: I'll read Judge Koh's opinion.

MR. HESTER: Okay. Thank you, Your Honor.

Let me move on very quickly, then, to the PI plaintiffs' consumer protection claims which are stated in Count 7. They state claims --

THE COURT: Let Mr. Panek get up.

MR. PANEK: Thank you, Your Honor.

Gabriel Panek for the personal injury plaintiffs.

MR. HESTER: The personal injury plaintiffs state claims under, quote, "applicable state law." They don't specify which laws they're talking about. But we've applied in our motion the choice of law approach, where at least one plaintiff claims to have primarily used Meta's services, which is the same choice of law analysis that the Court applied in the recent order on the Zuckerberg motion.

So, first of all, we've already talked about 17 states that are also encompassed within the AG motion that we filed that are covered in part two, so I wanted to focus on the additional states that we've highlighted in part three of my demonstrative.

The consumer protection statutes of eight other states

also do not apply to these personal injury claims. Idaho, Massachusetts, Tennessee all are limited to the trade or commerce limitation we've been discussing already. And then five state statutes do not apply by their own definitions. All of them require a sale or a purchase or some comparable requirement, and I've listed the language in part three. And those statutory definitions don't meet the requirements, don't meet the concept of the use of a free service as we've been discussing. So it's slightly -- it's a broader group, Your Honor. It's the same reasoning that we've been discussing, so I won't --

THE COURT: I see Texas in here. I thought Texas didn't have any claims.

MR. HESTER: Well, this is -- this is driven off of personal injury claims, so it would be a personal injury claim.

THE COURT: I didn't think we had any Texas plaintiffs.

MR. PANEK: I believe we -- Gabriel Panek for personal injury plaintiffs.

I believe we do, Your Honor, but I will double-check and confirm with the Court.

THE COURT: Go ahead, sorry.

MR. HESTER: All right. Your Honor, there's one more point I wanted to flag for the Court, which is the 18 states -- and it's a different point. Eighteen states require by statute

an ascertainable loss, quote, "ascertainable loss," for consumers to assert consumer protection claims. And those are listed in Appendix G, which provides the Court with the ascertainable loss statutory requirements state by state. That's Document 662-1, at pages 22 to 24.

And an ascertainable loss requires monetary damages or some other measurable loss. A good example is the California UCL, which requires a person who has, quote, "lost money or property."

And in the *Marinos* case that we cite in our briefs, the Court says: "A loss is ascertainable if it is measurable." And in the *D'Agostino* case that we also cite, the Court says: "An ascertainable loss is one that is quantifiable or measurable." The *Valley Nissan* case: "Loss of time and energy and mental anguish does not establish an ascertainable loss."

So under those standards, the plaintiffs are not alleging an ascertainable loss within the meaning of these statutes, and they can't establish an ascertainable loss as they pled their claim.

So, again, this goes back to the point that, as pled, the claims are deficient under the laws of these 18 states.

THE COURT: Response?

MR. PANEK: Thank you, Your Honor.

Taking those arguments in order starting with the consumer transaction or trade and commerce requirement, on the whole, we

don't believe that those phrases, which appear in the majority of states defendants have moved to dismiss, on this basis have a heightened sale requirement. We cite cases in our briefing, *FTD* and *Wynn* and other cases that reject a purchase requirement for those terms. Indeed, many of the states at issue define what encompasses a consumer transaction or trade or commerce, not with respect to what is a sale, but what is a sale or a disposition of property. And here, the defendants have not argued that what has occurred here doesn't fall within that.

Additionally, even if there is a sale requirement -- and this goes back to Your Honor's colloquy about Judge Koh's opinion in the *Yahoo* case. For one thing, Judge Koh in the *Yahoo* case recognized that personal information --

THE COURT: Slow down.

MR. PANEK: Yes, Your Honor.

THE COURT: Or you will not get a transcript that's accurate.

MR. PANEK: Well, we wouldn't want that to happen, so I will slow down. Thank you, Your Honor.

Judge Koh, in the *Yahoo* case, recognized that personal information has value and in subsequent cases denied motions to dismiss on the basis that plaintiffs who had their information stolen -- this is *Brown v. Google* and *Calhoun v. Google*, and indeed also the District of Maryland, Judge Grimm in the *Marriott* case have all denied on the basis that personal

information doesn't constitute money or property.

And this case is also distinct, because there's an ongoing monetization of the plaintiffs' data. That distinguishes this case from a one-time data breach.

And the *Arizona versus Google* case that the attorneys general just discussed I think discusses that well, as well. In that state, which is not at issue here, there was a purchase and sale requirement, and the Court said: "The exchange of personal information from the plaintiffs to the defendants," who in that case was Google, "for ongoing access to their product was a value, was consideration and was enough to fall within the statute." Defendants haven't cited any case under Maryland or those other states that they say have a purchase requirement that come out the other way under those states' laws.

And then moving on to the ascertainable loss point. Your Honor said it very well earlier. It costs money to deal with these harms. These are serious harms that the personal injury plaintiffs have suffered. They have suffered greatly, and they have expended resources to redress these harms. That answers the ascertainable loss question by itself.

THE COURT: Are they in the short-form complaint?

MR. PANEK: Yes, Your Honor.

And they -- the damages that they've suffered and the harms that they've suffered, those, that information is

included in the plaintiff fact sheets, which are incorporated into the short-form complaints. This provides defendants with the information about the injuries that the plaintiff suffered and what they had to expend in redressing them.

Defendants pointed -- Mr. Hester just pointed to Docket 662-1, but that just sets out the fact that some states have an ascertainable loss requirement. It doesn't actually define what an ascertainable loss is. We've pointed to cases that they have not rebutted.

For instance, the ***Ferguson*** case out of New Jersey, that reparative treatment constitutes ascertainable loss, the ***MT*** case that a personal injury constitutes ascertainable loss, and many others showing that loss of earnings and bills incurred with personal injuries constitutes ascertainable loss.

And I just want to very briefly mention that the three cases Mr. Hester mentioned, ***Marinos***, ***D'Agostino***, ***Valley***, one of those was at summary judgment.

THE COURT: Mr. Panek.

MR. PANEK: I'm so sorry, Your Honor.

THE COURT: I don't know what to have you do.

MR. PANEK: I will slow down. I will speak slowly.

The ***Marinos*** case --

THE COURT: Try breathing.

MR. PANEK: I'm sorry?

THE COURT: Try breathing.

MR. PANEK: The air is thin up here.

THE COURT: All right.

MR. PANEK: My last point is that the *Marinos* case was on summary judgment, *D'Agostino* and *Valley*, those were after trial. This is a fact question whether there's an ascertainable loss, but we've satisfied it at this stage.

THE COURT: Any other issue?

MR. HESTER: Your Honor, I -- just one thing that counsel said. He asserted that we do not claim that the language of sale or other disposition somehow changes the analysis. Other disposition is the same concept. There has to be some transfer, some conveyance that's not captured by the use of a free service. And the case law I think is quite consistent on this point, that if the language of the statute says sale, lease, other assignment or disposition, other disposition still is contemplating some form of conveyance that's not at issue here.

THE COURT: It's kind of like suggesting that there's a free lunch, and I thought all economists agreed there was no such thing.

MR. HESTER: Your Honor, I think it really goes back to this point about the defined scope of the statutes and whether the Court can disregard the way the Court -- the statutes have been written. That's the point we're making.

THE COURT: I don't think in your briefing, though,

you really do address -- and I'll go back and double-check. There were 15, I think, or 20 causes of action in ***Brown versus Google*** and ***Calhoun versus Google*** and the ***RTB*** case. Like I said, all of those moved forward, all of them were data privacy cases, and all of them involved damages.

So what happens when we inherit cases from other judges? We don't, you know ...

MR. HESTER: But as my colleagues have handed me a note, and, Your Honor, I'll just give it to you for what it's worth, that this issue was not presented in the ***Google*** case. It was a different issue from the issue before the Court.

THE COURT: It could be, but the -- like I said, I need to go back and double-check. I think she did those cases after the fact.

One of the realities is is that there is no, and hasn't been for many, many years, much transparency in terms of how these platforms are operating and what they were doing. So decisions were being made in the context of being much more blind to what was going on, and that's not lost on me either.

MR. HESTER: Your Honor, I would simply say on this point about the free use of a service, I think there's been disclosure for years and years that the consumer data was being what was being developed and used by Meta and other services. I think that's been widely known for years. I think that's set forth in the Terms of Use, and it's been set forth for years.

THE COURT: All right. Let's move on.

MR. PANEK: Thank you, Your Honor.

MR. HESTER: Thank you, Your Honor.

THE COURT: I'd like argument on the restitution issue. Seems to me that the states are conflating restitution and disgorgement; they're different.

Appearances for the record, please.

MS. MIYATA: Bianca Miyata for the state attorneys general.

MS. SIMONSEN: Ashley Simonsen, Covington & Burling, for the Meta defendants.

THE COURT: Response?

MS. MIYATA: Your Honor, I will turn to that in a mere moment, but I would like to first note that Meta's request is premature, because even under the narrow theory of restitution that Meta espouses would be correct here, the state AGs have pleaded sufficient facts to support that request. And we know that where a plaintiff has alleged facts that would support a request for restitution, dismissal at this early stage is inappropriate.

The states have pleaded facts regarding payments to Meta for subscriptions for Meta Verified, which provided features like extra visibility and support. The states have pleaded allegations regarding Meta's monetization of user data and how Meta takes user data from consumers, which we have discussed

earlier today has value, and then turns that into more profits. So I think under any theory, whether a broadened theory of disgorgement or under the narrow theory that Meta has considered, which is the mere exchange of dollars or property, we have made sufficient allegations for that request for a remedy to survive.

MS. SIMONSEN: Your Honor, Ashley Simonsen for the Meta defendants.

The states have not pled facts that satisfy the restitution requirements under the consumer protection statutes at issue. Those statutes which we have cited in the back and forth on this is in the states' Appendix E, which is Docket 701-2, at page 45. Those statutes define restitution in terms of essentially the recovery from the defendant of something that was taken from the plaintiff, and there -- in this case, there is nothing that was given by the plaintiffs, the users of Meta services, to Meta that could be restored in a restitutionary sense.

The states are pointing to subscriptions for something called Meta Verified. There's no allegation relating to any deception or unfair practices with respect to that particular subscription service. That's simply not what their claims relate to. And for that reason, they can't use whatever payments may have been made by consumers in connection with those subscription to argue that there is a basis for

restitution on their claims that focus on entirely different use of Meta services.

The second point my colleague has made regarding the allegation that Meta has monetized user data by turning it into profits underscores exactly why what they are doing is trying to conflate what Your Honor recognized at the outset, which is restitution with concepts like disgorgement. When, to the extent that Meta may make money from advertisers, that is money coming from advertisers. It is not money coming from the users of Meta services. The states are not suing on behalf of advertisers, they are suing on behalf of users of Meta services.

And so for those reasons, with respect to the restitution claims of the 22 states that we moved to dismiss, as well as the 11 states that are not seeking restitution, there is no restitution claim with respect to those states.

MS. MIYATA: Your Honor, if I may.

We disagree with Ms. Simonsen's characterization of the states' laws. While many of the states' laws do include language that say that there is a remedy for restoration of money acquired, it's money acquired by means of or as a result of a violative practice. There are not laws that say that this money must be paid directly from the user to Meta, and I think this is a great example for why that language is so broad. Meta clearly takes something of value from users and turns it

into something of more value. That is exactly what this language "by means of" is meant to apply to.

MS. SIMONSEN: And, Your Honor, we've cited the case law that completely discounts that argument. I mean, that is not what the state law on this issue interprets restitution to mean. It is very strictly defined. I'm sure Your Honor is familiar in California with the *Korea Supply* case. It is very, very strictly defined for it not to include concepts like disgorgement, or, you know, ill-gotten gains, or any kind of profit that the defendant may have made, to the extent that that profit did not come from the users on whose behalf the suit is brought.

And again, we lay all of that authority out in our response to the states' -- the citations in their Appendix E, Docket 701-2, at page 45.

MS. MIYATA: And, Your Honor, we disagree with that characterization. There is ample case law to state that the states' consumer protections laws are to be interpreted broadly. There's also ample case law that states that the states' laws regarding remedies, these equitable remedies, are to be interpreted, again, broadly. And I think you'll see in the crafting of our particular requests for relief there are requests for restitution. There are also requests for any other relief that the Court may deem to be just, or proper, or appropriate here.

THE COURT: So in those 22 states is restitution the only remedy, or is injunctive relief and other remedies allowed?

MS. MIYATA: Your Honor, I --

THE COURT: I'm asking, Ms. Simonsen.

MS. MIYATA: Oh, apologies.

MS. SIMONSEN: I am certain that injunctive relief is permitted under certain of those consumer protection statutes. For instance, the UCL authorizes injunctive relief as another form of equitable remedy.

THE COURT: So, again, back to the very beginning of this conversation. That doesn't mean that the claim is dismissed.

MS. SIMONSEN: They have asserted claims for restitution, and we're moving to dismiss the claims for restitution. And that is, it's, you know, very common. I can pull the cites, but in California, that courts, on motions to dismiss, will dismiss UCL claims to the extent that the relief sought is restitutionary in nature and there's been no allegation that there is money or property belonging to the plaintiff in the hands of the defendant.

THE COURT: I thought that there was injunctive relief sought, as well.

MS. SIMONSEN: There is injunctive relief sought, as well, but Your Honor can dismiss the restitution claims without

dismissing the claims for injunctive relief.

THE COURT: Well, the claim doesn't get dismissed; it gets narrowed. That's my point. You don't dismiss the claim because there isn't separate claims, one for restitution and yet another claim alleged for injunctive relief. There is one claim that is sought with multiple means of remedies, and what you're asking me to do is narrow the remedy.

MS. SIMONSEN: I am asking -- yes, that's correct, Your Honor. That's what we're requesting.

MS. MIYATA: And, Your Honor, I think you hit the nail on the head there. What Meta's requesting is the dismissal of a remedy, and at this point, because there are adequate facts pled that would plausibly support a theory under that remedy, that cannot be dismissed. There is case law certainly that says that if a remedy is pled and the claim itself for which the remedy is pled gets dismissed, the remedy doesn't survive. But that is not what we are talking about here today.

MS. SIMONSEN: And, Your Honor, I would just submit that there is benefit, as my colleague, Mr. Schmidt, outlined earlier, there is benefit to figuring out the ways in which this very broad complaint brought on behalf of 33 state attorneys general should be narrowed before we proceed further, and a ruling that they do not have claims for restitution would advance that purpose.

MS. MIYATA: Understood. But that would certainly still be premature to try to narrow the scope of remedies and to try to determine the contours of those appropriate equitable remedies at this early part in the litigation, when, again, they are supported by allegations of plausible facts.

THE COURT: All right. Next issue.

MS. SIMONSEN: Your Honor, would you like next to address the deceptive practices claims?

THE COURT: Well, I was moving to Florida, but ...

MS. SIMONSEN: Certainly happy to defer to my colleague, Mr. Hester, on that point.

MR. HESTER: Thank you, Your Honor.

We are raising these issues on person'~--

THE COURT: We need appearances for the record for purposes of the court reporter, who's not with us.

MR. HESTER: Apologies, Your Honor. Timothy Hester of Covington & Burling on behalf of Meta.

MS. VALIN: Donna Valin on behalf of the Florida Attorney General.

MR. HESTER: Your Honor, we're raising these issues of personal jurisdiction and venue now to avoid any risk of waiver on the question of personal jurisdiction and venue. The complaint alleges personal jurisdiction under the Florida long-arm statute, the conventional statute, not under COPPA.

Now, Florida now argues in its opposition papers that

there's personal jurisdiction under COPPA under nationwide service of process principles. And nationwide service of process can establish personal jurisdiction over COPPA claims but does not resolve the issue of venue. And that's stated very clearly in the Ninth Circuit decision in *Action Embroidery*, where the Court made clear that venue and personal jurisdiction are two separate and independent inquiries. And venue is not proper here under COPPA, not proper in Florida under the general venue statute, Section 1391, because venue is proper where the defendant resides or where a substantial part of the events or omissions giving rise to the claim occurred. And that clearly doesn't apply to Florida, even though we recognize that nationwide service of process that establishes personal jurisdiction.

And this venue issue needs to be resolved now.

THE COURT: Well, I agree. This looks like it's a good motion. The question is what, if anything, can you replead.

MS. VALIN: Your Honor, I'm sorry. I'd like to state our position.

THE COURT: Okay.

MS. VALIN: Our position regarding venue.

THE COURT: That's fine. It's not as if your papers haven't been filed.

MS. VALIN: Yes, Your Honor.

The defendant, Meta, needs to move to change venue at this juncture. The case that Meta is citing very clearly establishes that they're very separate concepts. And in that case, the Court did not reach venue and the venue analysis because they are separate. So I just want to point that out to the Court.

MR. HESTER: And Your --

THE COURT: You want me to have yet another round of briefing where things are pretty clear?

MS. VALIN: Yes, Your Honor.

THE COURT: Why?

MS. VALIN: Just so that Florida has the --

THE COURT: Don't you have a Rule 11 obligation?

MS. VALIN: Yes, Your Honor.

THE COURT: And because you have a Rule 11 obligation, don't you have an obligation to make things as efficient for the Court, as you know you should under the law?

MS. VALIN: Yes, Your Honor. That is correct.

THE COURT: Then why aren't you complying with your Rule 11 obligations?

MS. VALIN: We're happy to address venue, Your Honor, if the Court would like to hear venue.

THE COURT: Look, again, games don't work very well.

How much time do you need to replead your claims with respect to jurisdiction?

MS. VALIN: Ten days.

THE COURT: Motion's granted. Ten days to replead.

MR. HESTER: Thank you, Your Honor.

MS. VALIN: Thank you, Your Honor.

THE COURT: At the next conference, you let me know whether there's anything left to do.

MR. HESTER: Thank you, Your Honor.

THE COURT: All right. Remand.

MS. MIYATA: Your Honor, if I may clarify, did the Court wish to hear argument on the misrepresentation and omission claims?

THE COURT: Well, we'll see how I feel after the next one.

MS. MIYATA: Okay. Thank you.

THE COURT: Okay. Appearances for the record. Start with the plaintiff.

MR. CHIN: Edward Chin of Bruster, PLC for the Younger plaintiffs on the motion for remand.

MR. CHAPUT: Good afternoon, Your Honor. Isaac Chaput, Covington & Burling, on behalf of the Meta defendants.

THE COURT: Why shouldn't the defendants here be severed and the complaint relative to the New Mexico defendants just be sent to be dealt with in New Mexico and these defendants remain here? They don't seem to me to relate to each other, and I'm not, and I'm not persuaded by the issue of

apportionment. I understand that in the past, I have not subscribed to the theory that the defendants have brought, but it doesn't seem to me, as I look at the totality of this complaint, that these two sets of defendants should be in the same case.

MR. CHIN: Your Honor, I think it is appropriate to look at the totality.

So we've got this timeframe where the minor plaintiff, the deceased plaintiff, she -- I'll refer to her by the initials LK -- she died in -- she committed suicide in July of 2020. She started using social media apps, Instagram, Snapchat and Tiktok, dating as far back as roughly 2011. So you've got this eight- or nine-year timeframe of use which caused the addiction. And when we're talking about something that causes addiction, it's not something that happens one time. It's something that happens over, and over, and over again. You're using various features, using the primary feature --

THE COURT: That is a totally different case from the other New Mexico defendants. It's a totally different case.

MR. CHIN: I respectfully disagree. If I could explain why it's -- it is not totally different?

Along the way throughout this course of addiction, when she's encountering these New Mexico individuals, there's three of them: Mr. Stanford, Rodarte and Anaya. The first two gentleman, Stanford and Ronaya (phonetic), at separate times

they induced her, using Snap, to send sexually explicit photos to them via Snap. She's using these apps because she's already addicted. She's not handing them a hard copy. She's using these apps, this new technology that everyone knows is highly addictive, and she's induced to use this thing that she's highly addicted to. It's right on her phone all the time, and she's using that to convey these sexually explicit photos for which they then take advantage of. Independently, Mr. Rodarte, and separately Mr. Stanford.

When the jury, if we go to trial on this and everybody's -- you got the verdict form, you got the jury instructions, I think the jury is very likely going to consider when she's sending these Snap photos, for example, to these two gentlemen, why is she doing that? Who's fully -- who's responsible? Is she doing it because she's so addicted and there's some liability on the part of Snap, for example, or is it completely independent of that?

And when it gets down to closing argument, you can expect these social media defendants to clearly say, hey, don't look at us. We're just like the telephone. We're like any neutral thing on the Internet. Don't look at us, blame these guys. I don't think a jury -- I think a reasonable jury would really assess who's at fault here. Is she using a Snap -- the Snap feature where teens know that a picture disappears very quickly, and therefore she's induced to say, hey, maybe if I

send this sexually explicit photo no one's going to know about it, there aren't going to be that many consequence, it will just disappear?

So we've got this intertwining course of conduct over multiple years. And granted, there are various people have stepped into this picture. But if we're -- you definitely see high points of this inner-pointing aspect is the use of these apps. That's why. It's not -- you can't see them as separate buckets. A jury's going to look at everything.

How did -- why in the world would a teen send photos like this? What reasonable person would do that? Well, first of all, they're a teen. Oh, maybe she's addicted to this.

THE COURT: Response.

MR. CHIN: She's unlikely to do this.

THE COURT: All right. A response.

MR. CHAPUT: I think Your Honor has hit the nail on the head. There is no link between the individual defendants in this case and the social media defendants.

Counsel --

THE COURT: So, so it's not as if there's no link. It's a gray -- it's gray. It's not black and white. There is a link. You just heard it. There's a link. So you lose on that one if you say there's no link.

MR. CHAPUT: And I did not intend to overstate, Your Honor.

But plaintiffs do not allege any association between the individual defendants and the corporate defendants, apart from the alleged misuse by the individual defendants. That is their messaging of the plaintiff and their alleged taking screenshots of sexually explicit photos that she sent to them, as well as defendant Anaya's messaging of a third party to this case, a friend of the plaintiff's. But that misuse can't form a basis for liability as the corporate defendants, because plaintiff disclaimed in paragraphs 107 and 108 of the original complaint that they seek to hold the corporate defendants liable for content that was posted by third parties. And so those messages that were sent by the individual defendants are content posted by third parties that necessarily falls outside of plaintiff's claims.

And if you go to the elements of the claims that plaintiff will need to approve (sic) to establish liability as to the two separate groups of defendants, there is zero overlap. And the fact that the plaintiff may have suffered a single injury attributable, in part allegedly, to all of the different defendants' alleged actions is not enough to support joinder in this case.

And I think the *Odah* (phonetic) case that Meta cited is instructive here. The plaintiff there was involved in two car accidents a few months apart, and she sought to join the individuals responsible for those accidents in a single case.

The Court denied the request even though both actions -- accidents allegedly contributed to that single set of injuries, and the Court held that the facts surrounding the two incidents were wholly distinct from one another, and that the evidence required in determining the liability in either case will also be completely separate.

The same thing is true here. The evidence that plaintiffs will rely on to establish liability as to the corporate defendants will relate to their design and operation of social media services. The evidence, meanwhile, that plaintiffs will rely on to establish liability as to the individual defendants is completely separate. That evidence will focus on those individual defendants' intentional torts.

And so the appropriate course here is to sever those individual defendants, allow their claims to -- allow plaintiffs' claims against the individual defendants to proceed in New Mexico state court, and promote judicial efficiency by keeping the claims against the social media defendants here, where they belong, with the hundreds of other cases alleging effectively the same theory.

MR. CHIN: Your Honor, may I respond?

THE COURT: How about the mechanism, the procedural mechanism that you're trying to use? I've already once said that this is an inappropriate mechanism, and many, many courts have found the same thing. I don't typically like to be -- to

disagree with myself.

MR. CHAPUT: And I understand that, Your Honor.

Fraudulent misjoinder has routinely been applied in cases like this involving MDLs even when there was a closer nexus between the claims asserted against the diverse and non-diverse defendants. One case that I would point Your Honor to was the *Sutton* case out of the Eastern District of California. And there, plaintiffs' claims against non-diverse individuals for medical negligence in the use of a medical device were procedurally misjoined with claims against manufacturers based on a product liability-related theory arising from the design and manufacture of the same medical device to permit the diverse defendants' right of removal.

THE COURT: Well, why didn't you bring a motion to sever? They brought the motion for remand. Why not bring a motion to sever?

MR. CHAPUT: So in the original notice of removal that is precisely what was requested, which is typically procedurally how these cases progress, which is the notice of removal identifies fraudulent misjoinder as the basis for removal and then requests, as part of the notice of removal, severance of the individual defendants. Or, excuse me, the non-diverse defendants.

MR. CHIN: May I respond, Your Honor?

THE COURT: You may.

MR. CHIN: Your Honor, regarding the *Odah* case, there were two separate accidents involving completely different people who drove into the plaintiff's car. Completely different. They don't have this string of liability that persists for multiple years, as these social media defendants have.

THE COURT: What about paragraphs 107 and 108 that you -- where you disown the content, but here you're arguing content?

MR. CHIN: Well, it's gonna -- it does matter that the --

THE COURT: It's a problem.

MR. CHIN: Well, I think it's -- it doesn't matter in the sense that, yes, the pictures had sexually explicit photos, but, of course, what resulted from that? These individuals, two of the three New Mexico plaintiffs (sic), basically tried to extort her for sexual favors. And that led to her -- that contributed to her injuries.

So whether it was some other type of photo, you know, but ultimately there were things that affected her, of course. And, you know, so that is part of it, but --

THE COURT: So ultimately how fast are cases being tried down there in New Mexico?

MR. CHIN: It depends on~-- I honestly, I can't tell you with respect to the Court that this would go back into. I

don't ...

THE COURT: You don't practice down there?

MR. CHIN: I'm not licensed there. We're pro hac vice in that original ...

THE COURT: Why would I send a case back to a court? What judicial efficiency is there for -- as you heard earlier this morning, doesn't mean just because a case is here doesn't mean that it doesn't ultimately go back for trial. It means it's here for pretrial proceedings at a minimum, so that other courts don't have to do the same exact thing that we're doing here.

MR. CHIN: I think one reason, one is you're more likely to have these individual defendants actually participate in those proceedings. They were served. And I should note that they -- that the social media defendants actually moved for -- Meta moved for removal, even though these individual New Mexico defendants had gotten served, and then they never obtained consent from any of those individuals for the removal.

And so if this is back in state court, we hope certainly that these individuals, who are in New Mexico, would be much more inclined to participate in a proceeding to defend themselves in New Mexico, nearby, versus going all the way out here, from their perspective, to participate in any of that. They haven't had counsel been entered. They've -- one has answered. Mr. Anaya has answered on a pro se is basis. And

certainly you'd like to think that in a proceeding, you'd like to get as many of the -- everybody in it, all the defendants.

THE COURT: Okay.

MR. CHIN: That's a vast, very significant area of potential efficiency.

THE COURT: Well, I disagree, but I'll think about it.

Anything else?

MR. CHAPUT: Your Honor, if --

MR. CHIN: Well, if I could make one more point.

I mean, in the *DeWitt* case which both sides have discussed, in the *DeWitt* opinion, Your Honor quoted the Ninth Circuit opinion in the *Gaus v. Miles* as: "Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance." Even if one sees this as a gray area, we should win on that basis alone.

We would submit that there's significant doubt as to the basis for removal, but if it's a gray area, we should prevail.

THE COURT: Anything else?

MR. CHAPUT: Your Honor, if I may briefly.

First, on the consent point that counsel raised. I don't believe that was briefed, but in any event, the removal statute requires consent only from the defendants who are properly joined and served. And since we are asserting that the individual defendants were not properly joined and served,

their consent was not required to removal.

And with respect to the point that counsel concluded on, numerous cases, numerous courts, particularly in the context of MDLs, have found that a procedural misjoinder theory is appropriate, particularly because of the efficiency-enhancing benefits that it brings to the judge overseeing the MDL.

Thank you, Your Honor.

THE COURT: Okay. There's one last issue, Ms. Simonsen.

MS. SIMONSEN: Your Honor, Ashley Simonsen for the Meta defendants.

I did want to note there's one additional issue beyond misrepresentations and omission, which is the failure to warn issue.

THE COURT: Oh, right.

MS. SIMONSEN: I wanted ensure you -- which you would like to hear first.

THE COURT: We can hear failure to warn second. Go ahead.

MS. O'NEILL: And, Your Honor, this is Megan O'Neill on behalf of the state AGs.

MS. SIMONSEN: Thank you, Your Honor.

So I'll be addressing why both the state AGs, as well as the personal injury plaintiffs' claims based on alleged misrepresentations and omissions fail.

At their core, the plaintiffs' misrepresentation and omissions claims are premised on the theory that Meta deceived the public by supposedly touting the safety of its platforms, while allegedly concealing certain alleged risks to adolescents from using those platforms. The alleged misstatements can generally be divided into six --

THE COURT: So tell me -- I'm going to stop you in this regard. There is not a securities case, and I will not treat it like a securities case.

In a securities case, my standing order requires a chart, like you provided me, with every single statement. Because in a securities case, at a 12(b) -- at the motion to dismiss stage, I am required to evaluate every single statement in terms of its validity under the PSLRA. I will not do that here, and your arguments in that regard are denied. So don't even bother to do that. I look at them in this case globally. I will not look at them some other way. On some of the other issues I may choose to do that, but not here.

So you can proceed.

MS. SIMONSEN: Your Honor, may I just note for the record --

THE COURT: You can.

MS. SIMONSEN: -- that our position that Rule 9(b) does require that the Court address each alleged misstatement, which must be --

THE COURT: As long as they have sufficient statements to support the claim, the claim survives.

MS. SIMONSEN: That each statement, Meta would --

THE COURT: Not every single -- if they have -- if they've alleged 100, and 20 are good and 80 are bad, the claim still survives.

MS. SIMONSEN: Understood, Your Honor.

THE COURT: And I am not going to go through every single statement in this motion.

MS. SIMONSEN: Understood, Your Honor.

I understand that if Your Honor finds that there are some statements that are actionable, it's not necessary to address the remainder, and I didn't mean to suggest otherwise. Only that the --

THE COURT: The briefing suggested to the contrary. I'm just telling you I'm not doing it, and you should move forward.

MS. SIMONSEN: Okay. Understood, Your Honor.

Well, I will address combinations of sort of statements in different categories. I'm not going to walk through every single statement with Your Honor.

You know, we identify about six categories of statements: Statements relating to safety and well-being; statements relating to providing users with meaningful positive experiences; opinions about research in these areas and related

topics; statements about Meta's policies relating to under-13 users on the platforms; statements relating to the prevalence of allegedly harmful content on Meta's apps; and statements relating to Project Daisy.

Now, just at the outset, I do want to note that the statements that the states and the personal injury plaintiffs have identified are cobbled together from a lot of different sources, only one of which is actually an advertisement. And I think that that's notable, because particularly the state AGs are trying to make an argument that this was some kind of multi-facetted scheme of misleading advertising and misleading statements and omissions, but, in fact -- and this sorta bears on the trade and commerce argument my colleague was addressing.

The sources of these statements are drawn from a number of sources that consumers are highly unlikely ever to have seen or heard, like quarterly earnings calls, tech conferences, blog posts, press releases, one-off interviews going back to 2011. So --

THE COURT: State AG claims do not require reliance in the same way that individual claims do.

MS. SIMONSEN: Understood, Your Honor.

And my point is really to the argument that I think the states are trying to make, which is they're trying to portray this as a consumer deception case, and I think it's notable that the statements that they have identified for the most part

aren't statements that consumers would have seen. But I'll turn to addressing the reasons why, and I'll try to move quickly, Your Honor, these -- in these six categories the plaintiffs have failed to plead an actionable misstatement.

So all six categories are nonactionable either because they are statements of opinion or nonobjective, nonverifiable statements that are not measurable, or because the plaintiffs have failed to allege that the statement is actually false or misleading.

THE COURT: I understand the complaint to be an omission, partial misrepresentation case. Once you open the door, then there's an argument that you need to be fully forthcoming. So you don't put in here the omission analysis, and my view is that the complaint is an omission complaint.

MS. SIMONSEN: Your Honor --

THE COURT: So we're talking about two entirely -- we're in two different ballparks.

MS. SIMONSEN: Your Honor, we do address the omission theory. The plaintiffs' theory --

THE COURT: I don't recall that being in your list.

MS. SIMONSEN: Well, the state AGs have made clear that their theory of deception here is that there were certain information that was allegedly omitted that made certain statements misleading. Now, the problem with that theory is that if you look at the statements that they've identified,

those statements -- let's take these statements about safety, for instance. Those statements are not actionable, because they are general nonspecific statements about the safety of the platforms.

And we cited a number of cases that have held in directly analogous contexts that generalized assertions about, for instance, Lyft's commitment to safety, its safety measures, the role safety plays in the ride-share market were nonactionable.

The *Azule (phonetic) versus BMW* case held that there's nothing specific or measurable about the word "safety".

Judge Koh's decision, again, in the *Yahoo* case is particularly instructive. There, the plaintiffs were challenging as misleading Yahoo's statement that "protecting our systems and our users' information is paramount" on the ground that Yahoo allegedly knew and did not disclose risks of a breach --

THE COURT: Okay.

MS. SIMONSEN: -- or actual data breaches.

THE COURT: Response?

MS. O'NEILL: Thank you, Your Honor.

I'll just take a few points that Ms. Simonsen made in turn.

First, related to whether these statements were made in advertisements or in other contexts. There's nothing in the states' consumer protection laws that limit their application

to traditional forms of advertisement. As Your Honor has recognized, these statutes are meant to be construed liberally and broadly in favor of consumers, and consumers are aware of statements that are made outside of the context of advertisements.

I'd also just note, as Your Honor has recognized, that it is pertinent to look at the overall context of statements when we're evaluating whether consumers are likely to be misled or whether certain acts or practices are capable of misleading or confusing consumers. So it is entirely appropriate to take into consideration all kinds of messages that the consumer is presented with that they may already know from all different sources of information.

With respect to the tenor of our claim, Your Honor is correct that we would urge the Court to view the omissions and affirmative misrepresentations together in the same context as a course of deceptive behavior. The complaint, of course, specifies information that Meta left out of its representations, which we do believe made those representations false or misleading, but each of those representations represents a circumstance in which Meta has omitted relevant information. Those misleading misrepresentations and omissions are really two sides of the same coin when we're talking about consumer protection laws. However, they may be classified or categorized, they are behavior that is likely or has a tendency

to deceive consumers.

Even if the Court does decide to view these deception claims as affirmative misrepresentations, there is plenty of precedent, and we've cited this in our briefs, holding statements related to safety actionable, particularly when there are certain kinds of contacts which are present here. I think there are two particular aspects of the contacts that are really important to keep in mind.

First is that Meta had embarked on a campaign of selling safety to consumers. It had done internal research, a narrative audit that showed that consumers were wavering on this point, that consumers weren't sure if its platforms were unsafe. So it embarked on a campaign to make sure that consumers, their concerns were assuaged; that they were reassured.

The second part of contacts which I think is very important is that Meta had extensive knowledge of the ways in which its platforms were not safe. It had internal studies, internal statistics, internal surveys showing in many different ways how its platforms were not safe for use, in contradiction to how it presented the safety issues on its platform.

THE COURT: Mr. Warren?

MR. WARREN: Thank you, Your Honor.

Previn Warren, co-lead counsel for the personal injury plaintiffs.

I'll add just three points, hopefully not duplicative to what Ms. O'Neill had to say.

First, that Meta appears to be making the argument that its affirmative statements are mere puffery, but whether a statement is puffery is generally considered a question of fact. That's the *Ecodiesel* case. So it's not amenable to resolution on a motion to dismiss.

Second, I think the clearest precedent on point here is from Your Honor in the *In Re: Apple Securities Litigation* case in which you observed that, quote: "A party cannot affirmatively create a positive impression of an area it knows to be doing poorly."

THE COURT: So most of that case was thrown out. I don't know that you want to cite it.

MR. WARREN: Fair enough, Your Honor.

I'm not citing it for the bottom line, but I think that proposition is a proposition of law that is very applicable in these circumstances, given that the allegations in the complaint, both from the AGs, but from the personal injury claimants, as well, is that Meta knew it had a problem regarding youth safety, and yet it embarked on a campaign to characterize itself as doing well, even though it wasn't.

And the third point I'd make is just to clarify so the record is clear, that the personal injury plaintiffs are pursuing a theory of omission. We cite numerous affirmative

misrepresentations in the complaint, and the complaint could fairly be read to have pursued that theory. At this juncture we are not seeking to hold those as actionable on their own, but rather those affirmative misrepresentations speak to certain elements of the omission claim, for instance, Meta's intent.

THE COURT: The only other issue that I'll take argument on is Noerr-Pennington. I am not ruling on materiality at a 12(b)(6) motion. It's rarely, if ever, done, and I won't do it here.

MS. SIMONSEN: Thank you, Your Honor.

If I may respond briefly to these points made by the states?

THE COURT: You have two minutes to respond. So you take your two minutes, you can address whatever you want, but you got two minutes.

MS. SIMONSEN: Thank you, Your Honor.

The main point I want to make is that the theory of the case by the states and the personal injury plaintiffs is that Meta supposedly knew about risks to adolescents from the use of its services. Accepting that as true only for the purposes of this motion to dismiss, that does not make actionable a statement that is merely a generalized statement of, Mr. Warren referred to it as nonactionable puffery. That's not necessarily what we're calling it, but it is a generalized

statement that cannot be verified as true or false.

And there are other cases, the *Lyft* case that I mentioned, where there were similarly assertions that Lyft was aware of dangers to riders. So, for instance, they knew about alleged scores of sexual assaults by Lyft drivers, and the Court held that that did not directly contradict defendant's generalized assertions about Lyft's commitment to safety, its safety measures, and the role safety plays in the ride-share market. Because Lyft did not state that it guaranteed safety, but instead emphasized its belief in the importance of trust and safety, the statements were aspirational, indicative of corporate optimism, and not actionable as material misstatements.

The same was true in the *Yahoo* case, where the fact that there were data breaches, or risks of data breaches, that were known, could not make statements, generalized statements about safety, actionable. And that's --

THE COURT: Is that a securities case? And was it, I believe, a Northern District case?

MS. SIMONSEN: I believe it was, Your Honor, but the same concepts apply. And we outline --

THE COURT: I just want to make sure --

MS. SIMONSEN: Yes.

THE COURT: -- that we're talking about something I can look at. Certainly, it's not binding.

MS. SIMONSEN: It was a securities case, Your Honor. And we outline in Appendix A, Docket 701-2, all of the law that out' --

THE COURT: It's important to remember in that case the procedural issue. In that case I may have made the exact same decision that I do not make here, because this is not a securities case, and it is not the same standard.

You have 30 seconds left if you want to address Noerr-Pennington.

MS. SIMONSEN: Your Honor, it's clear that the 20 or so statements that the plaintiffs identify as having been made to Congress are in the heartland of First Amendment protection.

THE COURT: What protected petitioning activity was the defendant engaged in?

MS. SIMONSEN: The -- in all three -- so there were three occasions where executives from Meta were appearing before Congress to speak, and I can pull you the language from the transcripts where they were discussing proposed legislation that would affect the social media industry broadly. And in that context where the defendant is speaking to proposed legislation, that falls squarely within petitioning activity.

THE COURT: All right. The plaintiffs agree that they were petitioning for a change in federal law?

MS. O'NEILL: Your Honor, I don't think that that is clear. I think it's definitely not clear from the record

before you, and I think that's one of the reasons why courts, including this Court, have generally held that whether, and to what extent, Noerr-Pennington applies is a fact-intensive inquiry that's not ripe for a motion to dismiss. So I think there still are questions about whether this truly was petitioning conduct.

I think there also are large questions about whether the sham exception to Noerr-Pennington applies. That exception, of course, in the antitrust context applies when a business uses the governmental process itself, as opposed to any outcome of that process, in an anticompetitive way. Here, we've alleged that Meta used the governmental process itself, that is the hearings, rather than any outcome of that process related to legislation, in a deceptive and misleading way. In other words, the hearings were part and parcel of the deception that Meta has engaged in towards the --

THE COURT: Were the executives called to Congress, as opposed to, you know, being request' -- as opposed to asking to -- asking for the stage in which to address Congress?

MS. O'NEILL: Excuse me, Your Honor. In asking whether the Meta executives were subpoenaed to ...

THE COURT: Sometimes they're subpoenaed, sometimes they do it voluntarily. I'm asking whether it was Congress who was requesting, as opposed to the executives themselves.

MS. O'NEILL: Your Honor, I don't, as we stand here,

actually know the factual circumstances. They were not pled in the complaint or raised by Meta in its motion, so I do not know the specifics.

THE COURT: I see.

MS. O'NEILL: I think, again, that that is a reason why this inquiry is not ripe.

I do think that, you know, whether Meta was called to testify or whether it testified willingly is not really material, again, to the question of whether the sham exception applies. Whether Meta was voluntarily speaking to Congress or doing so under a subpoena is immaterial to whether they engaged in misleading and deceptive behavior.

THE COURT: All right.

MR. WARREN: Your Honor, may I be heard?

THE COURT: You may. And you need to speak up, please.

MR. WARREN: Oh, thank you. Sometimes the mic is a little low.

Respectfully, the personal injury plaintiffs do not believe this is a close call, and we do not believe that resolution of this issue needs to be deferred to another time. This was an affirmative defense that defendants opted to bring now, prior to the record being developed. So they could have saved that for later; they chose to bring it now.

Nothing in the complaint remotely suggests that Meta was

engaged in lobbying activity to petition the government at the time it lied to Congress, which is exactly what we allege they have done.

In a question for the record submitted by the Senate Judiciary Committee to Meta, Meta was asked -- and this is in the complaint at paragraph 3690 -- "Is Facebook able to determine whether increased use of its platform among teenage girls has any correlation with increased signs of depression within this demographic through the information collected from its suicide detection algorithm or other technology?"

Meta's response was one word: "No."

That was a lie. That's how we've alleged it in the complaint, and I think nothing about the Senate asking a question to Meta suggests that Meta was engaged in the active First Amendment protected activity of petitioning the government for a rule change, and there is just no record on which the defendants' attempts to build this First Amendment case that they have a right to lie to Congress, notwithstanding the fact that that's a federal crime under 18 U.S.C. 1001.

MS. SIMONSEN: Your Honor, respectfully, the allegation that Mr. Warren just pointed to is actually not even an alleged misstatement by the state AGs, and Mr. Warren has already clarified that they are not, the PI plaintiffs are not pursuing claims based on an alleged misstatement.

So that statement I would submit, Your Honor, isn't even

at issue.

It also was not false. The statement had to do with whether the suicide detection algorithm, you know, is capable of drawing any type of correlation. And we can obviously get into that at a later point in time, but the notion that these were false statements I could walk through with Your Honor. I won't do it, but if you look at the statements, you can see many of them are couched as opinions. Many of them are not measurable. Many of them are plainly, are plainly true on their face. The states and the PI plaintiffs have not identified with the requisite particularity what was actually false or misleading about some of these statements.

I did want to address, Your Honor, the PI plaintiffs' claims in particular for omissions, which they've clarified today is the only basis for their claims. Because even, you know, leaving aside the attorney general claims, the omission claims brought by the PI plaintiffs fail because they have failed to plead, whether you call it reliance, materiality or causation, they have failed to allege that they would have changed their behavior had the allegedly omitted information been disclosed.

And it is clear. We set forth the law in our appendices that that is a required element of the misrepresentation and omission claims under all of the states at issue.

THE COURT: Mr. Warren, response.

MR. WARREN: Thank you, Your Honor.

I think that we easily satisfy the reliance criteria when it comes to omissions. There are really two prongs under the *Daniel* case which Your Honor cited in your order on the Zuckerberg motion to dismiss, and the first prong is whether plaintiffs would have behaved differently had the truth been known. The second prong is whether they would have actually heard of the truth had it been disclosed. And I think we easily survive both of those prongs.

On the first, whether plaintiffs would have behaved differently, that bottoms out in a question of materiality. And, again, that's the *Daniels* case. But materiality is an objective inquiry. It does not require individualized allegations. That's clear in case after case, *FCA U.S. Monostable Electronic Gearshift* being one, *Ecodiesel* being another.

And more to the point, safety risks are material. That's what the *In Re: Myford Touch* case says.

So would plaintiffs have behaved differently is a question of materiality. Safety risks are material. And I think if the complaint, if the complaint does anything, it's to walk through the safety risks that we allege are present in these platforms that Meta did not disclose.

So that's sub-prong 1 where plaintiffs have behaved differently. Sub-prong 2 goes to awareness. And there the

question is whether the plaintiffs would have had an opportunity to receive and rely on the omitted information.

But these plaintiffs were addicted to Instagram. They were using these platforms six, seven, eight hours a day. Of course, they would have been able to get the information about the safety risks if Meta had just put it on the platform. And that's exactly the issue here. They didn't do that. They didn't warn these consumers or their parents.

So the notion that they had to read a particular periodical is ludicrous. They were on the method of communication that the defendants themselves controlled, and we think --

THE COURT: Okay. Failure to warn. You want to be heard on that?

MS. SIMONSEN: Your Honor, may I respond briefly? Because I think it is critical to look at the actual allegations in the short-form complaints here. These personal injury plaintiffs have not alleged reliance. There are only 25 short-form complaints that even contain any specific allegations.

THE COURT: Ask them to put it in the short-form complaint.

MS. SIMONSEN: Yes, Your --

THE COURT: That was negotiated.

MS. SIMONSEN: Your Honor, the short-form complaints

provide for the -- an allowance to allege additional facts necessary to support certain causes of action.

THE COURT: This is a basic element. Was this negotiated, or not?

MS. SIMONSEN: Well, the short-form complaints were negotiated, and they allow for additional space for plaintiffs asserting individualized claims, like misrepresentations and omissions, to asserts the facts needed to support those claims. Twenty-five plaintiffs chose to try to do that; the remaining 175 did not. This is their pleading burden. These elements are their pleading burden to plead.

And on the point about addiction, Your Honor, I just have to say, at a minimum, the claims for omissions, which, again, are the only claims they're bringing at this point, should be, at a minimum, dismissed with leave to amend for them to allege that they, when they learned of the disclosed information -- which, it's undisputed that they did, because the entire premise of their complaint is the information leaked by Frances Haugen, if -- they need to allege that they would have changed their behavior in light of those disclosures that they were unable to because, according to Mr. Warren, they were addicted. That allegation appears nowhere in the complaint.

And, again, it is plaintiffs' burden to plead --

THE COURT: If you say the word "again," you're done.

Next issue.

MR. WARREN: Can I very briefly respond, Your Honor?

THE COURT: Three sentences, starting now.

MR. WARREN: Okay. This was not part of the short-form complaint form, nor should it have been, because this is an objective inquiry that does not require individualized allegations of reliance.

And I did it in two.

THE COURT: All right.

MR. BLAVIN: Your Honor, Jonathan Blavin from Snap, on behalf of defendant Snap. We filed a separate joinder on the Count 7 claims against the non-Meta defendants. If I could just have one minute to make brief argument on that. It is distinct and separate from --

THE COURT: I don't think it's that distinct, but you have one minute.

MR. BLAVIN: Okay. Well, just very briefly, Your Honor, as an initial matter, plaintiffs actually didn't respond to any of the unique separate arguments we made in that joinder, so they have waived any response to that. But even if the -- Your Honor were to consider the merits, you know, as set forth in that joinder, first, they don't identify any misleading statements, misrepresentations by Tiktok or YouTube whatsoever. They identify a couple statements from Snap representatives. They don't, as we explained in the joinder, describe why those statements are actually false in any way.

And as set forth in the joinder, the allegations in the complaint actually demonstrate why they are not false. I'm not going to go through those today, Your Honor. Your Honor can obviously look at the pleading.

But then just finally, Your Honor, again, as to the Meta-related issues, they don't allege any type of reliance as to any statements made by the non-Meta defendants.

THE COURT: Thank you.

MR. BLAVIN: Thank you.

MR. PANEK: Your Honor, Gabriel Panek for the plaintiffs. And I've -- if I may briefly respond?

THE COURT: Thirty seconds.

MR. PANEK: Thank you, Your Honor.

First, we did respond to that, Snap's separate brief, in our complaint. We pointed -- in our briefing. We did point out that they largely focused on misrepresentations, whereas our complaint pursues an omissions theory.

And second, our complaint has hundreds of detailed allegations with respect to each separate group of defendants, including where specifically each defendant could have warned of the information and the knowledge that they have, and that satisfies all of the pleading burden at this stage.

THE COURT: All right. Next topic.

MR. PANEK: Thank you.

MS. MIYATA: Your Honor, before we -- apologies.

Bianca Miyata for the state attorneys general. Before we move off of the motion to dismiss the state AGs' complaint, I did want to go back briefly to the demonstrative that I believe Mr. Hester provided.

We have heard from a number of colleagues in our coalition from six separate states that they have concerns about inaccuracies in that demonstrative, and we simply wanted to request, to the extent the Court wishes to rely on any statement regarding state laws in this demonstrative, those states would like to have the opportunity for a limited written response to point the Court to where those laws have been clarified, or stated correctly, rather, in the states' charts and response in lieu of a surreply.

THE COURT: They gave me one page. You can have one page.

MS. MIYATA: Excellent, Your Honor.

May we submit that within a week -- by a week from today? By the 26th? Or if the Court would prefer it earlier, we are amenable to that, as well.

THE COURT: One week is fine.

MS. MIYATA: Okay. Thank you, Your Honor.

THE COURT: You should file that on the docket, the one-pager.

MR. SCHMIDT: Okay, Your Honor. We'll do that.

Paul Schmidt for Meta. May I proceed on the failure to

warn argument?

THE COURT: Who's speaking on the other side?

MR. SCHMIDT: It is an AG argument in terms of Section 230, failure to warn.

THE COURT: Go ahead.

MS. MIYATA: Apologies.

THE COURT: Go ahead.

MR. SCHMIDT: This is an issue that's come up several times, including in the interlocutory appellate context. So I appreciate the opportunity to address this issue. I'll try to be brief.

Our core point on failure to warn is that the law is very uniform in recognizing that where the failure to warn goes to the same content or the same publishing activity as other claims, it's equally barred by Section 230. That's true at a general level. Cases like ***Kimzey***, which say that the pleading form doesn't matter. That's true at the specific level in terms of a line of cases, ***Wozniak*** just recently from the California court of appeal, ***Herrick*** from the Second Circuit and Southern District, the ***LW*** and ***Bragg*** (phonetic) case from California federal courts, the ***Anderson*** case, the ***Facebook*** case, they all recognize that failure to warn claims are subject to Section 230 when they either relate to the same underlying content as other claims or the same publishing activity.

Here, the states are challenging underlying content in paragraphs like 187 and 846(c). They address, quote, "dangerous or harmful content, negative or harmful experiences." A case like ***Herrick*** speaks directly to that. Requiring Grindr to post a warning at the outset or along with each profile is no different than requiring Grindr to edit the third-party content itself.

The same principles hold true in terms of what Your Honor found in the earlier Section 230 ruling to be publishing activity. Your Honor made a finding that algorithms and the claim that algorithms were addictive, that was core publishing activity. I think Your Honor used the word "essential".

That's exactly what they're challenging here, both generally as to algorithms, but then also as to a failure to warn. They have a whole section, for example, starting at page 28 of the complaint talking about their allegation that Meta's algorithms encourage compulsive use. That's the addiction claim Your Honor addressed, which Meta does not disclose. That's a failure to warn slash omissions claim. That's heartland within Section 230. Under Your Honor's reasoning, that algorithm conduct is publishing activity that they are trying to attach liability to, exactly what Section 230 forbids.

And that is why cases like ***Wazniak*** say you can't substitute one -- a failure to warn claim for a non-failure to

warn claim on the same conduct. It would essentially allow every state cause of action otherwise immunized by Section 230 to be pleaded as a failure to warn of such information published.

Herrick did the same thing in the context of a features-type challenge, where the Court said it doesn't matter, the CDA applies at both the individual and systemic or architectural level.

The only response they've given is *Internet Brands*. In *Internet Brands* the warning very clearly had nothing to do with publishing activity. It had to do with information that the company independently had, and that was the only reason that that claim was allowed to survive. That's why all of these other cases have perennial, including within the Ninth Circuit, have perennially distinguished *Internet Brands* when the warnings allegations do relate to publishing features like those here.

That's our argument on that issue, Your Honor. Thanks for letting us make it.

THE COURT: Any response?

MS. MIYATA: Thank you, Your Honor.

You know, the AG's claims are based on Meta's own conduct here and on Meta's on speech and its decision not to speak about its knowledge of harms and about its own internal operations. These claims are not based on the publication of

third-party content, and the Court has already properly ruled that the failure to warn claims can survive.

I think in some of the cases that my colleague has cited there was a question about creative pleading. There's no such question about creative pleading here. The states have free-standing claims regarding these features, and then the states have free-standing claims regarding how their failure to speak was part and parcel with their own deceptive scheme.

In *Internet Brands*, I disagree with my colleague's representation of that case. Yes, it is true that warnings could have been posted, but there were warnings about knowledge about third-party content being posted on the site. So I don't think that case is a proper analog here, and we would ask the Court to apply its previous ruling regarding omissions -- regarding failure to warn claims to the state AGs' omission claims here, which are part of a greater deceptive scheme.

MR. SCHMIDT: If I may have 30 seconds, Your Honor.

When they say, we're challenging Meta's failure to speak, it's failure to speak about its publishing activities. *Dyroff* tells us, and I think Your Honor rightly found, that something like algorithms are a heartland publishing activity. They're how you present which content people see. To say you should have warned about your publishing activities is a direct attempt to attach liability based on a publishing function. That's heartland 230, definitional within the statute. That's

why the case law is uniform.

MS. MIYATA: May I have one line to respond?

THE COURT: You may.

MS. MIYATA: The state attorneys general do not seek to impose any liability based on the content that is being published or not. Instead, they're seeking to impose liability on Meta's failure to speak about the overall effect of its unfair business practices. That is not the same thing as a failure to speak about the underlying content that is being posted on the platform.

MR. SCHMIDT: But if I could say one last sentence.

When it goes to publishing activity, that's what Section 230 exists for. That's what they're saying Meta should have spoken about.

THE COURT: Okay.

MR. SCHMIDT: Thank you, Your Honor.

THE COURT: That's it for the motions. Is there anything else you want to discuss today?

MS. MIYATA: Not from the state AGs, Your Honor.

MR. HESTER: Your Honor, Timothy Hester on behalf of Meta.

Just one point following up on the Court's order on the motion to dismiss as to Mr. Zuckerberg. We have consulted and have come up with a schedule, and the Court had asked us to report today on that.

We have agreed with the plaintiffs that they will file their consolidated addendum in response to the Court's order by April 26, that Mr. Zuckerberg would renew his motion to dismiss on May 10, that the plaintiffs would file their response or opposition on May 23, and that Mr. Zuckerberg would file his reply on May 30. We've also agreed to page limits of 10, 10 and 6 for the two initial papers, and then 6 for the reply.

If that meets with the Court's approval, we can proceed that way.

THE COURT: So ordered.

MR. HESTER: Thank you, Your Honor.

THE COURT: Other issues?

MR. WEINKOWITZ: Your Honor, Mike Weinkowitz. A point of clarification.

At the next status conference we're having oral argument on the school district motion to dismiss. In that school -- in that motion to dismiss, the defendants largely go through the entirety of their 230 and First Amendment argument. Again, the same argument that we've heard over and over and that we heard in the PI text. I was wondering if Your Honor would be taking argument on that or would defer argument so that we could focus on nuisance and negligence, instead of rehearing 230 and First Amendment.

MR. SCHMIDT: Your Honor, this is the first I've heard of this today. We do agree generally that the Court's

prior analysis as to Section 230 applies equally to the school district's claims. Those are the arguments we make in our papers certainly. So to the extent Your Honor is inclined to follow the path Your Honor has previously paved here, you know, we would agree that there's probably not a need to go through that specific analysis again, but the -- you know, at least the school districts thus far have not taken that view. I think they've tried to distinguish, we would argue unpersuasively, your Court's prior analysis and tried to draw a different distinction.

So I don't want to sit here and give up the argument if they are still pressing on that point, because we think it is important that Your Honor continue to apply its previous Section 230 analysis to these claims, as well.

THE COURT: Well, you just made your argument, right? I don't need to hear anything else. Look, I am heading into a three-month trial, so I am not interested in hearing more than what I need to hear. Let's do it this way. The default is I don't need argument on that. I've now heard it twice, maybe even three times. If I want argument on a specific issue, I'll let you know.

MR. WEINKOWITZ: Thank you, Your Honor.

MR. SCHMIDT: Thank you.

THE COURT: All right. Other issues? No?

All right. Then it's taken under submission, and you all

have a safe travels, and I'll see you in about a month.

THE COURTROOM DEPUTY: Court is adjourned.

(Proceedings concluded at 1:51 p.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, APRIL 22, 2024

Stephen W. Franklin, RMR, CRR, CPE
Official Reporter, U.S. District Court